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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

JULIE SEJPAL, VINOD SEJPAL and ERICA LYNN SEJPAL, a minor, by Julie Sejpal, her guardian,

*Petitioners,*

—v.—

CORSON, MITCHELL, TOMHAVE & MCKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. MCKINLEY, DONALD R. MCKINLEY and CONEMAUGH VALLEY MEMORIAL HOSPITAL,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

## PETITION FOR A WRIT OF CERTIORARI


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38 pp

## QUESTION PRESENTED

Whether a Pennsylvania statute, 42 Pa. Cons. Stat. Ann. § 8305, that prohibits civil tort claims for "wrongful life" and "wrongful birth" violates petitioners' fundamental right to make procreative decisions or, by its purpose or effect, imposes an "undue burden" on a woman's right to choose abortion?

## PARTIES TO THE PROCEEDING

The parties to the instant proceeding are set forth in the caption on the cover of this petition. Notice has been given to the Attorney General of Pennsylvania pursuant to Pa. R. Civ. P. 235 and Pa. R. App. P. 521(a).

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The Columbia University College of Physicians and Surgeons, *Complete Guide to Pregnancy* (W. Duane Todd, M.D. et al., eds. 1988) . . . . . 4

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Letter to the Editor, *The Pro-Life Bonus of Amniocentesis*, 302 N. Eng. J. Med. 925 (1980) . . . . . 16

Michael T. Longaker et al., *Maternal Outcome After Open Fetal Surgery: A Review of the First 17 Human Cases*, 265 J. Am. Med. Assoc. 737 (1991) . . . . . 16

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 1 (5th ed. 1984) . . . . . 11

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No. 93-____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

JULIE SEJPAL, VINOD SEJPAL, and ERICA LYNN SEJPAL,
a minor, by Julie Sejpal, her guardian,

*Petitioners*,

v.

CORSON, MITCHELL, TOMHAVE & MCKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. MCKINLEY, DONALD R. MCKINLEY, AND CONEMAUGH VALLEY MEMORIAL HOSPITAL,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Julie Sejpal, Vinod Sejpal and their daughter, Erica Lynn Sejpal, respectfully pray that a writ of certiorari issue to the Supreme Court of Pennsylvania, Western District, to review a December 28, 1993, order denying the Sejpals' Petition for Allowance of Appeal.

## OPINIONS BELOW

In an unreported opinion and order dated March 4, 1992, the Court of Common Pleas of Cambria County, Pennsylvania, Civil Division, granted respondents' Preliminary Objections in the Nature of Demurrer or Motion to Strike and pursuant to 42 Pa. Cons. Stat. § 8305, dismissed petitioners' civil causes of action

for "wrongful birth" and "wrongful life." *Sejpal v. Corson*, No. 1991-2288-A (Pa. Ct. C.P. Mar. 4, 1992), 12a.[1] Also in unreported orders, the Superior Court of Pennsylvania, Pittsburgh District, affirmed the Judgment of the Court of Common Pleas on January 26, 1993, and on April 2, 1993, denied petitioners' Application for Reargument. *Sejpal v. Corson*, No. 581 (Pa. Super. Ct. Jan. 26, 1993), 3a; *Sejpal v. Corson*, No. 581 (Pa. Super. Ct. April 2, 1993), 11a. The Supreme Court of Pennsylvania, Western District issued a final order, in the form of a letter, denying the Sejpals' Petition for Allowance of Appeal on December 28, 1993. *Sejpal v. Corson*, No. 0209 (Pa. Dec. 28, 1993), 2a.[2]

## JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. § 1257(a) (1988).

## STATUTES INVOLVED

Act of 1988, April 13, (P.L. 366, No. 47 § 2), 42 Pa. Cons. Stat. § 8305, which prohibits causes of action for "wrongful birth" and "wrongful life."[3]

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[1] The opinions and orders are reprinted in the Appendix to this Petition For A Writ Of Certiorari. Citations to this Appendix are made to the page number therein as ___a.

[2] On March 21, 1994, Justice Souter granted until May 12, 1994, Petitioners' Application for Extension of Time in Which to File this Petition. 1a.

[3] 42 Pa. Cons. Stat. § 8305 provides:

> (a) Wrongful birth. -- There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born.

(continued...)

## STATEMENT OF THE CASE

Although arising in the context of a single tort action, this case raises substantial constitutional questions of grave importance to thousands of women, both in Pennsylvania[4] and throughout the United States.[5]

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[3] (...continued)

> Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for the wrongful death of a woman, or on account of physical injury suffered by a woman or a child, as a result of an attempted abortion. Nothing contained in this subsection shall be construed to provide a defense against any proceeding charging a health care practitioner with intentional misrepresentation under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, or any other act regulating the professional practices of health care practitioners.
>
> (b) Wrongful life. -- There shall be no cause of action on behalf of any person based on a claim that, but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted.

[4] The incidence of chromosomal abnormalities in liveborn infants is estimated to be between 1 in 50 and 1 in 200, and averages 1 in 178 live births (0.56%), Jack A. Pritchard et al., *Williams Obstetrics* 800 (17th ed. 1985) [hereinafter *Williams Obstetrics*], affecting approximately 928 children in Pennsylvania each year. National Center for Health Statistics, *Annual Summary of Births, Marriages, Divorces, & Deaths: U.S., 1992*, Monthly Vital Statistics Report, v. 41, No. 13 (Sept. 28, 1993) (Table 1) (reporting 165,206 births in Pennsylvania in 1992).

[5] Eight other states have enacted similar statutes that prohibit tort actions recoverable for "wrongful birth" or "wrongful life." *See* Ind. Code Ann. § 34-1-1-11 (Burns 1993) ("wrongful life" outlawed); Minn. Stat. § 145.424 (1993); Mo. Rev. Stat. § 188.130 (1992); N.C. Gen. Stat. § 14-

(continued...)

On August 30, 1989, Julie Sejpal gave birth to her daughter, Erica Lynn Sejpal, who was born with Down syndrome. Throughout her pregnancy, Ms. Sejpal received gynecological and obstetrical care from the five physician respondents, Drs. Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley, and Donald R. McKinley, who share a group practice incorporated as Corson, Mitchell, Tomhave & McKinley, M.D.S., Inc. (Corson, Mitchell). Ms. Sejpal delivered her daughter at and received post-partum care for herself and Erica from respondent Conemaugh Valley Memorial Hospital, where the Corson, Mitchell physicians have full privileges.

Ms. Sejpal first contacted Corson, Mitchell in January 1989 for a pregnancy test. On January 20, 1989, the date of her first obstetrics appointment with Dr. Robert Tomhave, Ms. Sejpal was 36 years old. As a teacher of disabled children who knows intimately the difficulties of raising children with Down syndrome, Ms. Sejpal was concerned that she might be at greater risk for fetal anomalies than would a younger woman. Therefore, she asked her physician whether she should undergo genetic testing, specifically amniocentesis. Dr. Tomhave provided Ms. Sejpal with information about three prenatal tests that may detect fetal anomalies: the Maternal Serum Alpha-FetoProtein blood assay ("MSAFP"), chorionic villus sampling, and amniocentesis.[6] However, Dr. Tomhave discouraged Ms. Sejpal from undergoing

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[5] (...continued)
45.1 (1993); N.D. Cent. Code § 32-03-43 (1993) ("wrongful life" outlawed); S.D. Codified Laws Ann. § 21-55-2 (1987); Idaho Code § 5-334 (1986); Utah Code Ann. § 78-11-24 (1993).

[6] Maternal Serum Alpha-FetoProtein test is a blood assay that tests for heightened levels of a protein produced by the fetal liver and passed into the mother's blood via the placenta. The Columbia University College of Physicians and Surgeons, *Complete Guide to Pregnancy*, 304 (W. Duane Todd, M.D. et al. eds. 1988). Chorionic villus sampling is the extraction and examination of a small fragment of the early placenta. *Id.* at 307. Amniocentesis is a technique in which a sample of amniotic fluid is extracted and examined. *Id.* at 305.

amniocentesis, stating that chorionic villus sampling or amniocentesis were only performed if the MSAFP test indicated a problem.

Two months later, on March 17, 1989, Ms. Sejpal underwent an MSAFP blood assay test ordered by Dr. Donald McKinley. The results of the MSAFP test, which were returned to the group practice on March 24, 1989, showed that Ms. Sejpal was at a greater than normal risk for giving birth to a child with Down syndrome. The lab report contained the specific warning: "Patient should be informed of the availability of sonar and amniocentesis. Genetic counseling is available to discuss modified risk and options for further testing."[7]

Despite the lab report and warning, Dr. Tomhave and other respondents never informed Ms. Sejpal or her husband of these results, never discussed with Ms. Sejpal the recommendation that she undergo amniocentesis, nor provided Ms. Sejpal or her husband with genetic counseling. The physicians never discussed alternatives for prenatal care, labor or delivery, or post-partum care, which might have better prepared the Sejpals for the birth of a disabled child, nor did they discuss the option of terminating the pregnancy by abortion. *See* Deposition of Julie Sejpal, March 8, 1994 (Sejpal Dep.) at 87-89a; Complaint at ¶¶ 18-27, 19-24a.[8]

Instead, Dr. Donald McKinley advised Ms. Sejpal to undergo an ultrasound test, which when performed on March 28,

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[7] *See* MSAFP test results ("Adjusted risk for Down Syndrome greater than 1/270"), 83a.

[8] Because the Court of Common Pleas dismissed the Sejpals' claims for wrongful birth and wrongful life on Preliminary Objections, the facts alleged in Petitioners' Complaint must be taken as true and reviewed in the light most favorable to petitioners. *See Gabel v. Cambruzzi*, 616 A.2d 1364, 1367 (Pa. 1992). The testimony of Ms. Sejpal, given under oath at her deposition, is an example of the evidence the Sejpals would present if permitted to go forward with a trial.

1989, showed that Ms. Sejpal's pregnancy was not progressing as expected. These ultrasound results coupled with the MSAFP blood test results provided yet another signal that Ms. Sejpal was at serious risk for giving birth to an infant with chromosomal abnormalities. But despite these clear indicators of fetal anomaly, Dr. Donald McKinley advised Ms. Sejpal that everything was fine, and merely suggested that her pregnancy was not as far advanced as he had previously believed. In response to her specific question about whether the blood assay test should be repeated, Dr. McKinley again reassured Ms. Sejpal that everything was fine and that there was no need to repeat the test. The same question was put to Dr. Robert McKinley at a subsequent prenatal visit on July 14, 1989; he also assured Ms. Sejpal that additional genetic testing was unnecessary, noting that it was too late to do a retest. Sejpal Dep. at 90-91a. By failing to suggest further genetic testing that would discern fetal anomalies, the physicians deprived Ms. Sejpal and her husband of accurate information upon which to decide whether to terminate the pregnancy.

On August 30, 1989, Dr. Richard McKinley delivered Erica by Cesarean section under spinal anesthesia. After the delivery, a nurse wrapped Erica in a blanket and only briefly showed her to her parents before rushing off. In response to repeated questioning by Dr. McKinley, the nurse claimed that the baby was fine but that she needed some oxygen. Sejpal Dep. at 91-92a.

Prior to delivery, on August 24, 1989, Ms. Sejpal had given her informed consent for a fallopian tubal ligation, a method of female sterilization,[9] to be performed immediately after the delivery, while Ms. Sejpal was still in the operating room and under partial anesthesia. Following the delivery, Dr. Richard McKinley performed the tubal ligation without first informing the

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[9] Fallopian tubal ligation is a surgical procedure in which a variety of techniques are employed to disrupt tubal potency and thereby thwart the union of sperm and egg. *Williams Obstetrics*, at 827.

Sejpals of Erica's condition and without determining whether Ms. Sejpal's initial grant of consent remained voluntary and informed. Significantly, Ms. Sejpal learned of Erica's Down syndrome from her husband only after her sterilization was completed. Had Ms. Sejpal known of Erica's condition prior to the tubal ligation, she would have chosen to withhold consent, preserving the option of having another child at some future date. Sejpal Dep. at 90a.

In their Complaint, petitioners allege that respondents failed to inform Ms. Sejpal about the results of the MSAFP test; misinterpreted the results of her ultrasound test; failed to provide Ms. Sejpal with appropriate information about further genetic testing that would have detected Down syndrome, including chorionic villus sampling or amniocentesis; failed to offer Ms. Sejpal and her husband appropriate genetic testing and counseling; failed to advise the Sejpals immediately that Erica had been born with Down syndrome; and failed to determine whether Ms. Sejpal's consent to her sterilization by tubal ligation remained voluntary and informed. Petitioners alleged that, but for the negligent acts of the physicians and the hospital, Ms. Sejpal would have had the appropriate information necessary to decide whether to terminate her pregnancy; Ms. Sejpal would have chosen abortion; and Ms. Sejpal would not have undergone the Cesarean section or the sterilization at the time of Erica's birth. They therefore sought damages for "wrongful birth" and "wrongful life."

Relying upon 42 Pa. Cons. Stat. § 8305, respondents filed Preliminary Objections in the Nature of Demurrer or Motion to Strike, seeking to dismiss the Sejpals' "wrongful birth" and "wrongful life" claims. In response, petitioners asserted that 42 Pa. Cons. Stat. § 8305 violated their rights to privacy guaranteed by the 14th Amendment of the United States Constitution.[10]

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[10] It was at this stage of the proceedings below that the federal question sought to be reviewed here was first raised. *See* Plaintiffs' Answer to Preliminary Objections of Defendants Corson, Mitchell, et al., dated Jan.

(continued...)

Granting respondents' Preliminary Objections and dismissing petitioners' claims pursuant to 42 Pa. Cons. Stat. § 8305,[11] the Court of Common Pleas of Cambria County, Pennsylvania found that "these statutes do not violate the due process clause and other provisions of the United States Constitution." *Sejpal v. Corson*, No. 1991-2288-A, 13a. The lower court denied the Sejpals an opportunity to prove at trial that Pennsylvania's "wrongful life" and "wrongful birth" statute interferes with an individual's fundamental right to make procreative decisions or that the law imposes an "undue burden" on a woman's abortion choice because it has the "purpose or effect of placing a substantial obstacle in the path of a woman who seeks an abortion of a nonviable fetus." *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2820 (1992).

Specifically, had the Sejpals been permitted to go forward with their case, they would have proven at trial that the statute, which prevents children born with birth defects and their parents from bringing claims for damages, impermissably insulates physicians from liability for failure to advise women about the availability of genetic tests that will detect fetal anomalies and for failure to counsel pregnant women about the risks of birth defects. The "wrongful birth" and "wrongful life" statute gives legal protection to those physicians who provide false or misleading information to their patients or who purposefully withhold from their patients information central to the exercise of informed reproductive decision-making including: which, if any, pregnancy-related health care and genetic testing is appropriate for the pregnant woman, whether to continue a pregnancy to term

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[10] (...continued)
31, 1992, 60a; Plaintiffs' Answer to Preliminary Objections of Defendant Conemaugh Valley Memorial Hospital, dated Jan. 31, 1992, 63a.

[11] The Court of Common Pleas also granted respondents' Preliminary Objections and dismissed petitioners' Unfair Trade Practices and Consumer Protection Act claims. Petitioners do not appeal that dismissal.

or to have an abortion, and what options the woman may choose with respect to future childbearing. Moreover, the Sejpals would have proven that, when passing the statute, the Pennsylvania General Assembly explicitly intended to prevent women from using genetic testing and choosing abortion.

The Superior Court of Pennsylvania affirmed the order of the lower court and denied petitioners' request for reargument.[12] Denying the Sejpals' Petition for Allowance of Appeal, the Supreme Court of Pennsylvania left in place the improper dismissal of petitioners' "wrongful birth" and "wrongful life" claims and finally denied them the opportunity to demonstrate that the statute is unconstitutional. *See Sejpal v. Corson*, No. 0209, 2a.

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[12] The Superior Court did not address the merits of petitioners' constitutional claims. After finding that petitioners' "wrongful birth" and "wrongful life" claims "would not have supported a recovery because they specifically are precluded by 42 Pa. Cons. Stat. §§ 8305(a) and (b)," the court declined to consider petitioners' claim that the statutory preclusions are unconstitutional under *Planned Parenthood v. Casey*. *Sejpal v. Corson*, No. 581, 7a. The Superior Court found "this issue waived since the Commonwealth was not a party to the action and [the court's] examination of the record reveals no indication that appellants provided the Attorney General of Pennsylvania with notice of their constitutional challenge in accordance with Pa. R. App. P. 521(a)." *Id.* at 8a. In their Motion for Reconsideration and Reargument, petitioners, who were represented by different counsel than appear here, submitted three proofs of service as proof that the Attorney General had been notified, *see* Application for Rearguement at 66a, but that the Attorney General declined to appear before the Superior Court to defend the statute's constitutionality. Even assuming *arguendo* that appropriate notice was not provided by previous counsel, this procedural error should not bar consideration of the grave constitutional questions at issue here, particularly since the Attorney General will have ample opportunity to respond to this petition and to participate in the litigation in the event *certiorari* is granted.

## REASONS FOR GRANTING THE WRIT

This case presents matters of grave public importance affecting the ability of women and families to make fully informed procreative decisions. While the principles to be applied are based on settled precedent, the application of those rules to the particular context of a state statute barring tort actions for "wrongful birth" or "wrongful life" has not yet,[13] but should be, settled by this Court. Thus, this case meets the standards for granting a writ of certiorari set forth in Sup. Ct. R. 10.1(c).

### I. THE CHALLENGED STATUTE VIOLATES AN INDIVIDUAL'S FUNDAMENTAL RIGHT TO MAKE PROCREATIVE DECISIONS.

#### A. By Insulating From Liability Those Physicians Who Interfere With Women's Procreative Liberties, The State Participates Directly In The Constitutional Violation.

The constitutionality of 42 Pa. Cons. Stat. § 8305, which prohibits tort actions for "wrongful birth" and "wrongful life," is the central issue in this case. "Wrongful birth" suits arise when a physician fails to advise a woman of the possibility of genetic testing, fails to discover diagnosable genetic or congenital disorders, or fails to inform a woman of this diagnosis, thereby preventing her from making an informed choice whether to continue or terminate her pregnancy by abortion. "Wrongful life" suits are brought by a child suing for damages resulting from his or her own birth under similar circumstances. The recovery of damages can provide essential funds to help defray the exorbitant

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[13] This Court has previously denied *certiorari* in similar cases. *See Wilson v. Kuenzi*, 751 S.W.2d 741 (Mo.), *cert. denied*, 488 U.S. 893 (1988); *Azzolino v. Dingfelder*, 337 S.E.2d 528 (N.C. 1985), *cert. denied*, 479 U.S. 835 (1986); *Edmonds v. W. Pa. Hosp. Radiology Assoc.*, 607 A.2d 1083 (Pa. Super. 1992), 621 A.2d 580 (Pa.), *cert. denied*, 114 S. Ct. 63 (1993).

expenses that families incur in providing necessary medical care, psychological treatment, and educational services for severely disabled children. *See* Wilbur L. Tomlinson, *Torts - Wrongful Birth and Wrongful Life*, 44 Mo. L. Rev. 167, 174-75 (1979).

As the Pennsylvania General Assembly recognized when passing this statute, tort actions also serve the purpose of discouraging behavior viewed by society as undesirable. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 1, at 6-7 (5th ed. 1984). Indeed, the risk of medical malpractice actions has been recognized as a general deterrent to poor medical practices, and a key factor contributing to proper practice. *See* Peter A. Bell, *Legislative Intrusions into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability*, 35 Syracuse L. Rev. 939, 966-68 (1984) (reporting that the threat of wrongful birth and other malpractice liability changes physician behavior).[14]

Although the state has considerable latitude to regulate damage awards in personal injury cases, it cannot, as here, exercise this power in a way that unconstitutionally interferes with a woman's fundamental right to make procreative decisions, *see infra* Point I.B., or in a manner that places a substantial obstacle in the path of a woman who chooses abortion. *See Casey*, 112 S. Ct. at 2820; *infra* Point II. Some courts have

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[14] In *Troppi v. Scarf*, 187 N.W.2d 511, 517 (Mich. Ct. App. 1971), the Michigan Court of Appeals discussed the deterrent effect of tort claims when deciding whether there is a claim for "wrongful life" or "wrongful birth" when a pharmacist fails to dispense contraceptive drugs accurately:

> [T]he imposition of civil liability encourages potential tortfeasors to exercise more care in the performance of their duties, and, hence, to avoid liability producing negligent acts . . . . [P]ublic policy favors a tort scheme which encourages pharmacists to exercise great care in filling prescriptions. To absolve defendant of all liability here would be to remove one deterrent against the negligent dispensing of drugs.

dismissed petitioners' constitutional challenges to "wrongful life" and "wrongful birth" statutes because it is the physician, not the state, who provides false or misleading information to or withholds full and accurate information from women. *See, e.g., Edmonds v. W. Pa. Hosp. Radiology Assoc.*, 607 A.2d 1083 (Pa. Super. 1992), 621 A.2d 580 (Pa.), *cert. denied*, 114 S. Ct. 63 (1993); *Dansby v. Thomas Jefferson Univ. Hosp.*, 623 A.2d 816 (Pa. Super. 1993); *Flickinger v. Wanczyk*, 843 F. Supp. 32 (E.D. Pa. 1994).[15] These courts failed to recognize, however, that so long as the physician's conduct is protected by statute, the injury suffered by the woman carries the state's imprimatur. Through its insulating legislation, the Commonwealth directly supports and encourages physicians who interfere with women's procreative choices, and thereby participates directly in the constitutional violation. *See Robak v. United States*, 658 F.2d 471 (7th Cir. 1981) ("Any other ruling would in effect immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to abort fetuses, which, if born, would suffer from genetic . . . defects."); *Phillips v. United States*, 508 F. Supp. 544 (D.S.C. 1981); *Berman v. Allan*, 404 A.2d 8 (N.J. Super. 1979); *cf. Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 69, 74-75 (1976) (state cannot delegate to third party a power that it does not itself possess).[16]

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[15] None of these decisions considered whether the challenged statute had "the purpose . . . of imposing a substantial obstacle in the path of a woman seeking an abortion." *Casey*, 112 S. Ct. at 2820. *See infra* Point II.A. Neither did the lower courts hold an evidentiary hearing about how the statute infringes upon fundamental rights to procreation and imposes an "undue burden" on a woman's abortion choice.

[16] In *Troppi*, 187 N.W. at 517, the Michigan Court of Appeals also recognized that the denial of a tort remedy for negligence in dispensing contraceptives would infringe upon an individual's constitutional right to use contraception. The Court noted:

> The State may not infringe upon the rights of husband and

(continued...)

### B. The Challenged Statute Impermissibly Interferes With An Individual's Procreative Decisions And Is Not Narrowly Drawn To Serve A Compelling Interest.

This Court has long recognized rights of privacy and bodily integrity. As early as 1891, it held,

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . . .

*Union Pacific R.R. Co. v. Botsford*, 141 U.S. 250, 251-52 (1891). Throughout the last century, this Court has recognized that the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as childrearing, marriage, procreation, and contraceptive choice. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). These cases embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny must remain free from unwarranted governmental intrusion. *Eisenstadt*,

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[16] (...continued)

> wife to use contraceptives to limit the size of their family. Since the state may not infringe upon this right, it may not constitutionally denigrate the right by completely denying protection provided as a matter of course to like rights.

187 N.W. at 517. *See also Bowman v. Davis*, 356 N.E.2d 496, 499 (Ohio 1976) ("For this court to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations except those involving sterilization would constitute an impermissible infringement of a fundamental right").

405 U.S. at 453.

Recently, in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, this Court reaffirmed the correctness of these decisions, finding that

> [t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

*Id.* at 2807.

That the panoply of protected rights includes an individual's right to control a full range of medical decisions about procreation is without doubt. This Court and others have guaranteed as fundamental the right to use contraception, *Griswold*, 381 U.S. at 485, the right to be free from coercive contraception, *People v. Pointer*, 199 Cal. Rptr. 357, 364 (Cal. Ct. App. 1984), the right to voluntary sterilization, *Ruby v. Massey*, 452 F. Supp. 361 (D. Conn. 1978), and the right to be free from the coercive and eugenic use of sterilization. *Skinner*, 316 U.S. at 541. Moreover, the right to bear children and to control decisions about childbearing options, including the timing and method of delivery, have all been recognized as within the protected zone of privacy, *see In re: A.C.*, 573 A.2d 1235 (D.C. App. 1990) (patient choice governs medical decision-making for pregnant patients); *Baby Boy Doe v. Doe*, No. 1-83-4322, 1994 Ill. App. LEXIS 501, at *1 (Ill. App. Ct. Apr. 5, 1994) (a woman's competent choice to refuse Cesarean section must be honored). Courts have repeatedly required that limitations on these rights be subject to the highest level of constitutional review.[17] As this Court noted in *Carey v. Population Servs.*

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[17] This Court has repeatedly recognized that an individual's right to

(continued...)

*Int'l*, 431 U.S. 678, 685-86 (1977), "regulations imposing a burden on [these rights] may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."[18]

Central to a woman's procreative decisionmaking is her right to obtain information and to make decisions about genetic testing and her subsequent medical treatment during pregnancy, whether she carries the pregnancy to term or chooses abortion. "The cluster of constitutional choices . . . must also include the right to submit to a procedure designed to give information about [the] fetus." *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990), *aff'd*, 914 F.2d 260 (7th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991). *See also Margaret S. v. Treen*, 597 F. Supp. 636, 673 (1984), *aff'd on other grounds*, 794 F.2d 994 (5th Cir. 1986) (statute prohibiting fetal experimentation is unconstitutional because it "unduly limits the medical information obtainable through experimentation in that it deprives women of information concerning the likelihood of fetal deformity in their future

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[17] (...continued)
make informed medical decisions flows from principles of bodily integrity. *See Casey*, 112 S. Ct. at 2806 (Joint Opinion); *Id.* at 2840 (Stevens, J., concurring in part and dissenting in part) ("One aspect of [the woman's liberty] is a right to bodily integrity, a right to control one's person."); *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 269 (1990) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body") (quoting *Schloendorff v. Society of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914)).

[18] Despite this Court's recognition in *Casey* that the right to choose abortion derived from these fundamental rights, the Joint Opinion found that the countervailing state interest in potential fetal life demanded that the Court narrow the level of constitutional protection afforded to women seeking abortion. Thus, the Court applied the "undue burden" test when judging the constitutionality of abortion restrictions, *see infra* Point II. However, the strict scrutiny standard remains applicable to the interferences with procreative liberty discussed here because there are no countervailing interests in protecting fetal life at stake.

pregnancies"). Genetic testing enables individuals, particularly those with a history of genetic abnormalities, to conceive a child and become parents without the fear of passing on the disabling genetic trait to their offspring. The availability of genetic testing enables pregnant women and their families to make special preparations for the birth of a disabled child[19] and enables women to obtain *in utero* treatment or genetic transplants that will, upon birth, enhance the child's survival or health.[20] Thus, women's ability to use genetic testing lies at the heart of the privacy right and state laws that interfere with this right must be subject to the same strict standards of review used to measure the constitutionality of laws that infringe fundamental liberty interests.

The Pennsylvania statute cannot survive scrutiny under this strict standard. Denial of appropriate information about her pregnancy, including information about genetic testing that would have discovered Erica's Down syndrome, as well as the failure to inform her that Erica had been born with Down syndrome has denied Ms. Sejpal and her husband the ability to make voluntary and intelligent decisions about medical treatment and has caused

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[19] Contrary to the statutory presumption, not all women who discover genetic anomalies choose abortion. Between 1974 and 1978, researchers asked 297 women who had mid-trimester amniocentesis: "What would you have done if amniocentesis had not been available?" 12.4% of women studied either would have chosen not to become pregnant or chosen to have an abortion had amniocentesis not been available. Only two percent of women studied would have chosen to have an abortion had amniocentesis been available. *See* Letter to the Ed., *The Pro-Life Bonus of Amniocentesis*, 302 N. Eng. J. Med. 925 (1980).

[20] For example, fetal surgery is a treatment for various fetal anomalies including congenital diaphragmatic hernia, a birth defect in which the fetal diaphragm fails to close, or hydronephrosis, distension of the pelvis caused by obstruction of the ureter. *See* Michael T. Longaker et al., *Maternal Outcome After Open Fetal Surgery: A Review of the First 17 Human Cases*, 265 J. Am. Med. Assoc. 737 (1991); Thomas L. Pinckert, M.D., et al., *Fetal Surgery*, 15 Current Controversies in Perinatal Care 943 (1988).

Ms. Sejpal both to forego an abortion and to undergo a Cesarean section and sterilization operation that she otherwise would not have had. The state legislation, which denies the very remedy afforded to other persons harmed by medical wrongdoing, encourages this malfeasance. By providing safeharbor to physicians who knowingly violate settled norms of the medical profession, the Commonwealth compounds the physicians' interference with women's constitutionally protected rights to make procreative decisions.

Moreover, the statute is not narrowly drawn to further a compelling purpose. The state's interest in maternal health is not furthered by this restriction. A statute that encourages physicians to provide information and care below acceptable medical standards does not further women's health, indeed it is inimical to it. By encouraging physicians to withhold information that might enable women to plan for the birth of a disabled child or provide life-saving *in utero* treatment, the statute makes it more difficult for disabled infants to obtain appropriate assistance and health services. No state interest in health could possibly be served by this harsh policy.

## II. THE CHALLENGED STATUTE IMPOSES AN "UNDUE BURDEN" ON A WOMAN'S RIGHT TO CHOOSE ABORTION.

### A. The Purpose Of 42 Pa. Cons. Stat. § 8305 Is To Place A Substantial Obstacle In The Path Of A Woman Choosing Abortion.

In addition to violating an individual's fundamental right to make procreative decisions, the challenged statute imposes an "undue burden" on a woman's right to choose abortion and is therefore unconstitutional under this Court's ruling in *Planned Parenthood v. Casey*. 112 S. Ct. at 2791. In *Casey*, this Court elaborated on the meaning of an "undue burden":

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or

> effect of placing a substantial obstacle in the path of a woman seeking abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

112 S. Ct. at 2820.

The legislative history of the "wrongful birth" and "wrongful life" statute[21] establishes beyond any doubt that the Pennsylvania General Assembly specifically intended to impose a "substantial obstacle in the path of a woman seeking an abortion" and chose a means that was calculated to hinder, not inform, the woman's free choice. Thus, the statute violates the first prong of the *Casey* test.

42 Pa. Cons. Stat. § 8305 became law in 1988 after an almost identical piece of legislation was passed but vetoed by Governor Thornburgh in 1984.[22] This legislation was sponsored

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[21] Courts may turn to floor debate to shed light on legislative purpose. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 56-57 (1985) (examining state legislative floor statements to determine presence of secular purpose); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268 (1977) (looking to contemporaneous statements by members of the decisionmaking body or minutes of its meetings to determine legislative intent).

[22] In his veto message, the Governor expressed concerns about the law's constitutionality:

> [T]he Supreme Court of the United States has clearly held that a woman has a constitutional right to an abortion, at least during the first trimester of her pregnancy. Under these

(continued...)

by Rep. Stephen Freind and Sen. Joseph Rocks, the sponsors of a larger package of restrictive amendments to the 1982 Abortion Control Act, which have been the subject of litigation before this Court and lower federal courts for over a decade.[23]

The "wrongful birth" and "wrongful life" statute was described as a way to insulate anti-abortion physicians who, because of their opposition to abortion, refuse to give full and complete health information to women. For example, in House debates Rep. Freind stated, "the presence of these lawsuits. . . [is] requiring physicians against their will and against their conscience to practice recommending eugenic abortion," Pa. House Leg. J. 306 (Feb. 24, 1988), and, "[i]t is up to [the physician] to choose whether or not to advise a patient of the availability of certain procedures." Pa. House Leg. J. 1949 (Nov. 24, 1987). Rep. Freind repeatedly acknowledged that a physician who negligently failed to inform a woman of necessary information or even deliberately withheld information or misled a patient could not be subject to a lawsuit.[24] As Rep. Freind noted in his testimony in

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[22] (...continued)

> circumstances, the intelligent exercise of that right should not be made to depend on the competence, diligence, integrity or philosophical views of a particular attending physician.

Pa. Senate Leg. J. 2674 (Sept. 17, 1984) (veto message of Governor Thornburgh dated July 3, 1984).

[23] For a procedural history of this litigation, *see American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 287-89 (1986); *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1326-38 (E.D. Pa. 1990); *Planned Parenthood v. Casey*, 822 F. Supp. 227, 230-31 (E.D. Pa. 1993).

[24] This grant of immunity from liability to physicians who lie to their patients concerned several legislators. For example, Dr. Samuel Henck in testimony before a House Committee reviewing the legislation, stated that he regularly did not and would not inform his patients of the existence of amniocentesis out of fear that the test would lead his

(continued...)

support of the "wrongful birth" and "wrongful life" legislation:

> until *Roe v. Wade* is reversed . . . those in the pro-life movement must be as aggressive and creative as possible in drafting and passing legislation which regulates and restricts abortions as much as possible.

*Hearings on H.B. 1361 and H.B 1362 Before the House Judiciary Comm.* (Nov. 12, 1987) (statement of Rep. Freind).

Several members of the General Assembly who opposed the bill specifically noted that the legislation was intended to harm women and to sanction the intentional withholding of important and relevant information from pregnant women by physicians who oppose abortion. For example, Senator Craig Lewis stated that these statutes would "shield and provide an absolute immunity . . . where clear and unquestioned negligence visits a lifelong financial damage upon the parents . . . ." Pa. Senate Leg. J. 1962 (March 22, 1988). The legislation was perhaps most accurately described by Senator James Greenwood:

> What it really is and what it really ought to be called is the legalized medical malpractice bill for anti-choice physicians in Pennsylvania.

Pa. Senate Leg. J. 1960 (March 22, 1988).[25] Given that the

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[24] (...continued)
patients to choose abortion. *Hearings on H.B. 1361 and H.B. 1362 Before the House Judiciary Comm.* (Nov. 12, 1987) (statement of Dr. Samuel H. Henck). As a result of this testimony, Representative David Heckler proposed an amendment to the 1987 Abortion Control Act which would have mandated that the State Board of Medicine require physicians to advise pregnant patients of the availability of maternal and fetal diagnostic tests, but the amendment was defeated. Pa. House Leg. J. 1949 (Nov. 24, 1987).

[25] Indeed, the statute's biased purpose -- insulating from tort liability
(continued...)

"means chosen by the State to further the interest in potential life" is calculated to hinder rather than "inform the woman's free choice," *Casey*, 112 S. Ct. 2820, it is an unwarranted intrusion into women's liberty and must be invalidated by this Court.

### B. The Challenged Statute Places A Substantial Obstacle In The Path Of A Woman's Abortion Choice.

The right to choose abortion, as established by this Court in *Roe* and reaffirmed in *Casey*, is essential to a woman's ability to make intimate decisions about her life and family, as well as to protect her bodily integrity. Implicit in and central to this right to choose is the woman's right to be given all relevant and necessary information, so that she can make both an informed and meaningful decision. This is particularly important where, as here, the woman is "entitled to rely [on her physician] for advice in connection with her decision." *Whalen v. Roe*, 429 U.S. 589, 605 n.33 (1977). Legislation which insulates physicians and encourages them to keep necessary and relevant information from women, violating professional standards and denying women meaningful reproductive choice, permits fundamental reproductive liberties to be subject to the arbitrary and private moral views of

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[25] (...continued)
those physicians who do not reveal relevant and necessary information that might lead a pregnant woman to choose abortion, but imposing liability on physicians who are alleged to have negligently performed an abortion -- is apparent from the face of the legislation. 42 Pa. Cons. Stat. § 8305 (a) provides: "Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for the wrongful death of a woman or a child, as a result of an attempted abortion." This bias is further confirmed by the fact that the 1982 Abortion Control Act, by amendments passed in 1988 and 1989, imposed obligations on physicians who perform abortions to disclose a litany of state mandated information in the interest of an "informed choice." *See* 18 Pa. Cons. Stat. §§ 3205, 3208.

these professionals. *See Carey*, 431 U.S. at 693 n.24 (1977).[26]

In *Casey*, this Court upheld a requirement that a physician provide information relevant to a woman's informed consent "as a reasonable means to insure that the woman's consent is informed." 112 S. Ct. at 2824-25. The Court emphasized, however, that such information must be "truthful and not misleading," *id.* at 2823, and "must be calculated to inform the woman's free choice, not hinder it." *Id.* at 2820.

Moreover, the Court made clear that state requirements compelling a physician to provide false or misleading information or legislative attempts to prejudice the woman's decision through the provision of incomplete information are impermissible.

> [W]e have upheld regulations of abortion that are not efforts to sway or direct a woman's choice but rather are efforts to enhance the deliberative quality of that decision or are neutral regulations on the health aspects of her decision . . . . Conversely, we have consistently rejected state efforts to prejudice a woman's choice, either by limiting the information available to her, *see Bigelow v. Virginia*, 421 U.S. 809 (1975), or by "requir[ing] the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.'"

112 S. Ct. at 2841 (Stevens, J., concurring in part and dissenting

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[26] To help a patient make an informed decision, health care professionals have a legal and professional duty to inform a patient of all treatment options. The doctrine of informed consent dictates the dialogue that must take place between physician and patient. *See Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Canterbury v. Spence*, 464 F.2d 772, 783 n.36 (D.C. Cir. 1972) ("Duty to disclose is more than a call to speak merely on the patient's request, or merely to answer the patient's questions; it is a duty to volunteer, if necessary, the information the patient needs for intelligent decision."), *cert. denied*, 409 U.S. 1064 (1972).

in part) (citations omitted).[27]

As this Court established in *Casey*, "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects." 112 S. Ct. at 2829. *See also infra* Point II.C. Both for Ms. Sejpal, who was denied essential information about and access to genetic screening and who, as a result, carried to term a pregnancy that she otherwise would have terminated, as well as for "a large fraction" of other women, who are similarly denied essential health information, the prohibition of "wrongful birth" and "wrongful life" actions has operated to deny their reproductive choice. *See Casey*, 112 S. Ct. at 2829; *Carey*, 431 U.S. at 686-87. By encouraging physicians to keep from their patients information relevant to decisions about abortion, the state places its imprimatur upon the false and misleading dialogue between physician and patient as surely as if the state itself was in the examining room. The statute must therefore be found unconstitutional under *Casey*.

### C. Dismissal Of Their Claims Without Affording Plaintiffs An Opportunity To Present Evidence Conflicts With This Court's Ruling In *Planned Parenthood v. Casey*.

The lower courts dismissed petitioners' "wrongful birth" and "wrongful life" claims on respondents' Preliminary Objections.

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[27] Justice Stevens added,

> "[I]t may be argued that the [statute] is justified by the mere fact that it is likely to reduce the number of abortions, thus furthering the State's interest in potential life. But such an argument would justify any form of coercion that placed an obstacle in the woman's path. The State cannot further its interests by simply wearing down the ability of the pregnant woman to exercise her constitutional right."

*Casey*, 112 S. Ct. at 2841 (Stevens, J., concurring in part and dissenting in part).

As a result, petitioners never had an opportunity to prove that the challenged statute has both the purpose and effect of imposing an "undue burden" on a woman's ability to choose abortion.

The Joint Opinion in *Casey* clearly established that the determination of whether or not a law imposes an "undue burden" is not merely a legal conclusion. When holding unconstitutional Pennsylvania's husband notification provision, the Court made an individualized factual assessment whether the restriction had an unconstitutional purpose or effect. The Court closely examined the effect of the statute on the ability of women to choose abortion, measuring the law's impact on the women who were actually affected by it. The Joint Opinion found:

> Respondents attempt to avoid the conclusion that § 3209 is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions . . . . We disagree with respondents' basic method of analysis. The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects . . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

112 S. Ct. at 2829.

That *Casey* established a new standard requiring lower courts to conduct an individualized fact-based analysis to determine whether a challenged statute unduly burdens a woman's right to choose abortion was recently emphasized by Justice O'Connor in her concurring opinion in *Fargo Women's Health Org. v. Schafer*, 113 S. Ct. 1668 (1993). In response to a lower court's dismissal of a facial challenge to North Dakota's abortion restrictions under *United States v. Salerno*, 481 U.S. 739, 745 (1987) (facial challenge must be rejected unless there exists *no set of circumstances* in which the statute constitutionally can be applied), Justice O'Connor, joined by Justice Souter, noted:

> In striking down Pennsylvania's spousal-notice provision, we did not require petitioners to show that the provision would be invalid in *all* circumstances. Rather, we made clear that a law restricting abortions constitutes an undue burden, and hence is invalid, if, 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.' And the Joint Opinion specially examined the record developed in the district court in determining that Pennsylvania's informed-consent provision did not create an undue burden. While I express no view as to whether the particular provisions at issue in this case constitute an undue burden, I believe the lower courts should have undertaken the same analysis.

*Fargo*, 113 S. Ct. at 1669 (citations omitted) (emphasis in original).

Justice Souter recently reiterated that courts must conduct a fact-based analysis when assessing laws that interfere with a woman's right to choose abortion. *See Planned Parenthood v. Casey*, 114 S. Ct. 909 (1994) (Souter, J., Circuit Justice) (rejecting petitioners' request to reopen the record but emphasizing that similar litigants are free to bring facial and "as applied" challenges).[28]

*Casey* and the caselaw discussed above addresses the need for an individual evidentiary hearing in *facial* challenges to abortion restrictions. Here, however, petitioners challenge Pennsylvania's "wrongful birth" and "wrongful life" statute *as*

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[28] *See also Planned Parenthood v. Casey*, 14 F.3d 848, 861 (3rd Cir. 1994) ("[a]t a minimum, we believe the Court meant [in *Casey*] that . . . state abortion laws require individualized application of the undue burden standard"); *id.* at 863 n.21 ("the Court has, in this case, set a new standard for facial challenges to pre-viability abortion laws . . . . *Casey* requires only that a plaintiff show an abortion regulation would be an undue burden 'in a large fraction of the cases.'").

*applied* to their circumstances. That plaintiffs are entitled to an evidentiary hearing to demonstrate how the challenged statute imposes an "undue burden" on Ms. Sejpal's ability to obtain an abortion is thus even clearer. *See Ada v. Guam*, 113 S. Ct. 633 (1992) (Scalia, J., dissenting from denial of petition for a writ of certiorari) ("Statutes are ordinarily challenged, and their constitutionality evaluated, 'as applied' -- that is, the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional.) (citing *Salerno*, 481 U.S. at 745).

## CONCLUSION

Because the lower courts dismissed petitioners' "wrongful birth" and "wrongful life" claims without providing them an opportunity to present evidence, petitioners respectfully request that this Court grant the Petition for a Writ of Certiorari, reverse the decision of the Supreme Court of Pennsylvania, and remand this action to the lower court for further proceedings. The remand will enable the lower court to determine whether the challenged statute interferes with a woman's right to procreative liberty and, if so, whether that interference is supported by a compelling state interest that is narrowly drawn to support only that interest; whether the law has either the purpose or effect of imposing an "undue burden" on pregnant women's right to choose abortion; and finally the extent to which petitioners are entitled to recover damages on their claims for "wrongful life" and "wrongful birth." To avoid manifest injustice to the Sejpals, whose rights were violated, granting the Writ and then remanding the case is both necessary and appropriate.

Respectfully submitted,

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Dated: May 12, 1994

Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

JULIE SEJPAL, VINOD SEJPAL and ERICA LYNN SEJPAL, a minor, by Julie Sejpal, her guardian,

*Petitioners,*

—v.—

CORSON, MITCHELL, TOMHAVE & MCKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. MCKINLEY, DONALD R. MCKINLEY and CONEMAUGH VALLEY MEMORIAL HOSPITAL,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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*SUPREME COURT OF THE UNITED STATES*

*No.*

A-778

Julie Sejpal, et al.,

Petitioners

v.

Mitchell, Corson, et al.

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ORDER

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UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including

May 12, 1994.

/s/ David Souter
Associate Justice of the
Supreme Court of the United States

Dated this 21st
day of March, 1994.

# THE SUPREME COURT OF PENNSYLVANIA
# WESTERN DISTRICT

Charles W. Johns, Esquire
Prothonotary
Irma T. Garder
Deputy Prothonotary

801 City-County Building
Pittsburgh, PA.
15219-2463
(412) 565-2816

December 28, 1993

Kenneth W. Behrend, Esquire
BEHREND AND ERNSBERGER
2400 Grant Building
Pittsburgh, PA 15219

In Re: Julie Sejpal and Vinod Sejpal and Erica Lynn Sejpal, a minor, by Julie Sejpal, her guardian, Petitioners v. Corson, Mitchell, Tomhave & McKinley, M.D.S., Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley, Donald R. McKinley and Conemaugh Valley Memorial Hospital
No. 0209 W. D. Allocatur Docket 1993

Dear Mr. Behrend:

The Court has entered the following Order on your Petition for Allowance of Appeal filed in the above-captioned matter:

**"PER CURIAM:**

**AND NOW, this 28th day of December, 1993, the Petition for Allowance of Appeal is denied.**

**Mr. Justice Larsen did not participate in the decision of this case."**

Very truly yours,
/s/ Irma T. Gardner
DEPUTY PROTHONOTARY

ITG: llb
cc: David Donaldson, Esq.
Frank J. Stanek, Esquire
Frank J. Hartye, Esquire
Thomas Halloran, Esquire
Hon. F. Joseph Leahey

| | |
|---|---|
| JULIE SEJPAL, VINOD SEJPAL and ERICA LYNN SEJPAL, a minor, by Julie Sejpal, her guardian, Appellants | ) IN THE SUPERIOR ) COURT OF ) PENNSYLVANIA |
| v. | |
| CORSON, MITCHELL, TOMHAVE & MCKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. MCKINLEY, DONALD R. MCKINLEY AND CONEMAUGH VALLEY MEMORIAL HOSPITAL, | ) No. 00581 ) Pittsburgh, 1992 |

Appeal from the Order Entered March 4, 1992, in the Court of Common Pleas of Cambria County, Civil Division, at No. 1991-2288-A.

BEFORE: ROWLEY, P.J., JOHNSON, and HESTER, JJ.

MEMORANDUM: Date: January 26, 1993

Vinod and Julie Sejpal, together with their minor daughter, Erica Lynn Sejpal, appeal from the order entered in the Court of Common Pleas of Cambria County on March 4, 1992, which sustained certain preliminary objections in the nature of a demurrer. For the reasons set forth below, we affirm.

The procedural history of this case may be summarized as follows. On August 27, 1991, nearly two years after Erica's birth, appellants instituted this action by filing a praecipe for a writ of summons against Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley, Donald R. McKinley, Conemaugh Valley Hospital, and Corson, Mitchell, Tomhave, and McKinley, M.D.S., Inc. Several months later, following service of the writ, appellants filed a complaint asserting counts for fraud,

medical malpractice, lack of informed consent, wrongful birth, wrongful life, and violations of the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* Those counts related to the care provided to Mrs. Sejpal during the course of her pregnancy and its impact upon both Erica's birth and Mrs. Sejpal's subsequent tubal ligation.

In support of their causes of action, appellants alleged that the individuals and the professional corporation both concealed information and made a number of express and implied misrepresentations by failing to reveal that Mrs. Sejpal's age put her in a high risk category for giving birth to an impaired child, that a test conducted on Mrs. Sejpal further demonstrated that the risk was involved in her pregnancy, that amniocentesis was available for purposes of evaluating the situation, and that Mr. and Mrs. Sejpal had a right to terminate the pregnancy. In addition, appellants, who claimed that amniocenteses would have demonstrated that Erica suffered from a defect, asserted that the individuals that Erica suffered from a defect, asserted that the individuals and the corporation failed to inform Mr. and Mrs. Sejpal that it was standard medical practice under the circumstances to conduct an amniocentesis, to advise them of their rights regarding the termination of the pregnancy, and to provide them with counseling concerning the possibility of having additional children. Appellants also averred that Erica, who was born by Caesarean section, was afflicted with Down's Syndrome, and that Mrs. Sejpal underwent an elective tubal ligation on the day of the birth. Finally, they alleged that Mrs. Sejpal would not have given birth to Erica or undergone the subsequent sterilization absent the improper conduct and that Conemaugh Valley Hospital, by neglecting to provide proper supervision, bears some responsibility for their losses.

Shortly after appellants filed their complaint, appellees filed preliminary objections in the nature of a demurrer to the counts relating to the claims for wrongful birth, wrongful life, and violations of the Unfair Trade Practices and Consumer Protection Law.[1] On March 4, 1992, the trial court entered an order, which

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[1] We note that the preliminary objections filed on behalf of Hamptom

(continued...)

dismissed those counts. This timely appeal followed.

Preliminarily, we note that we have an obligation to consider the propriety of each appeal and that such consideration may be undertaken sua sponte. *Gatten v. Merzi*, 397 Pa.Super. 148, 579 A.2d 974 (1990) (*per curiam*). Absent a specific statutory provision to the contrary, any appeal determined to be interlocutory must be quashed. *Id.* Accordingly, we sua sponte consider the propriety of the present appeal, which arises out of the dismissal of some but not all of the counts contained in a multi-count complaint.

> "As a general rule, an order dismissing some but not all counts of a multi-count complaint is interlocutory and not appealable." *Praisner v. Stockner*, [313 Pa.Super. 332, 459 A.2d 1255 (1983)]. However, the *Praisner* court enunciated an exception to this rule when it held that if the causes of action are separate and distinct, dismissal of some but not all claims is immediately appealable. *Id.* at 341, 459 A.2d at 1260.
>
> Subsequent decisions have clarified this exception through application. Most recently, an *en banc* panel of this court examined whether an action for professional negligence for failing to administer amniocenteses was separate and distinct from one alleging professional and negligence for failure to obtain informed consent. In *Jenkins v. Hospital of Medical College of Pennsylvania*, 401 Pa.Super. 604, 585 A.2d 1091 (1991), the court stated that in determining whether a plaintiff has been "put out of court" when a particular claim is dismissed, "we look to see whether the claims that have been

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[1] (...continued)
Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley, Donald R. McKinley, and the corporation bearing their names also raised challenges to the specificity of certain allegations and requested the court to enter an order striking all claims for damages in excess of $20,000.

> dismissed and those that remain 'request different relief for different harms.'" *Id.* at 611-12, 585 A.2d at 1094 (quoting *Daywalt v. Montgomery Hospital*, 393 Pa.Super 118, 122, 573 A.2d 1116, 1118 (1990)).

*Bash v. Bell Telephone Co.*, 411 Pa.Super. 347, 351-51 [sic], 601 A.2d 825, 827 (1992).

In the present case, appellants filed a complaint containing claims of fraud, medical malpractice, lack of informed consent, wrongful birth, wrongful life, and violations of the Unfair Trade Practices and Consumer Protection Law. However, in accordance with preliminary objections filed by appellees, the trial court entered an order dismissing the latter three classes of claims. Since the claims relating to the Unfair Trade Practices and Consumer Protection Law obviously were based upon statutory authority, we must consider them separate and distinct from claims which were not affected by the trial court's order. *See Gatten v. Merzi, supra.* We also consider the wrongful life count separate and distinct as it is the only count set forth in the complaint requesting relief on behalf of Erica.

Unlike the unfair trade practice and wrongful life counts, the final class of allegations, which concern claims for wrongful birth, require more than a cursory analysis. Our examination of the complaint reveals that the wrongful birth claims are premised upon allegations of fraud, medical malpractice, and violations of the Unfair Trade Practices and Consumer Protection Law. Despite this fact, it is clear that the claims seek damages arising from the birth of Erica. This harm is distinct from those set forth in the claims that survived the trial court's decision, which related to both the procedure by which the birth was accomplished and the tubal ligation. Accordingly, as allegations relating to three contested classes of claims are separate and distinct from those which remain, we conclude that the instant appeal is properly before us.

We now address the merits. The standard utilized for reviewing the propriety of decisions sustaining preliminary objections in the nature of a demurrer is well-established. In *Gatten v. Merzi, supra*, 397 Pa.Super. at 151, 579 A.2d at 975,

we discussed that standard and, quoting *Gordon v. Lancaster Osteopathic Hospital Assn.*, 340 Pa.Super. 253, 489 A.2d 1364 (1985), stated:

> On appeal from an order sustaining preliminary objections in the nature of demurrers, this Court is concerned only with determining the legal sufficiency of appellant's complaint. *Schoot v. Westinghouse Electric Corporation*, 436 Pa. 279, 259 A.2d 443 (1969). We must confine our analysis to the complaint and decide whether sufficient facts have been pleaded which would permit recovery of ultimately proven. *Id.*; *D'Antonia v. Hampton Grinding Wheel*, 225 Pa.Super. 120, 310 A.2d 307 (1973).

With these principles in mind, we must examine the contested classes of claims.

It is clear that appellants' wrongful birth and wrongful life claims would not have supported a recovery because they specifically are precluded by 42 Pa.C.S. § 8305(a) and (b).[2]

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[2] In pertinent part, 42 Pa.C.S. § 8305 (footnotes omitted) states:

> **(a) Wrongful birth.** -- There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born. Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for the wrongful death of a woman, or on account of physical injury suffered by a woman or a child, as a result of an attempted abortion. Nothing contained in this subsection shall be construed to provide a defense against any proceeding charging a health care practitioner with intentional misrepresentation under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, or any other act regulating the professional practices of health care practitioners.
>
> **(b) Wrongful life.** -- There shall be no cause of action on

(continued...)

Recognizing this fact, appellants contend that the statutory preclusions place an impermissible burden on a woman's right to an abortion and thus, are unconstitutional under *Planned Parenthood v. Casey*, 505 U.S. ___, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). We find this issue waived since the Commonwealth was not a party to the action and our examination of the record reveals no indication that appellants provided the Attorney General of Pennsylvania with notice of their constitutional challenge in accordance with Pa.R.A.P. 521(a).[3] *See Kepple v. Fairman Drilling Co.*, ___ Pa. ___, ___ A.2d ___ (Nos. 54, 55, and 86 W.D. Appeal Dockets, 1991, filed 11/10/92) (failure to comply with requirements of Pa. R.A.P. 521(a) results in waiver); *see also Butler v. Rolling Hill Hospital*, 382 Pa.Super. 330, 555 A.2d 205 (1989).

We now turn to appellants' claims regarding violations of the Unfair Trade Practices and Consumer Protection Law. Our reading of appellants' complaint reveals that they have premised those claims on the misrepresentation and concealment of facts by the various individual appellees, who both operated the professional corporation bearing their names and engaged in the practice of obstetrics. In addition, we note that appellants alleged

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[2] (...continued)

> behalf of any person based on a claim that, but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted.

[3] That rule provides:

> **(a) Notice.** It shall be the duty of a party who draws in question the constitutionality of any statute in any manner in an appellate court to which the Commonwealth or any officer thereof, acting in his official capacity, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the appellate court, to give immediate notice in writing to the Attorney General of Pennsylvania of the existence of the question; together with a copy of the pleadings or other portion of the record raising the issue, and to file proof of service of such notice.

that these misrepresentations and concealments occurred during the course of Julie Sejpal's prenatal care.

It is clear that the Unfair Trade Practices and Consumer Protection Law does not permit a person to recover damages from a physician for explicit statements made to him during the course of treatment. *See Gatten v. Merzi, supra* (holding that allegedly inaccurate statements made by a physician regarding both a patient's course of treatment and the probable results of that treatment will not support a cause of action under the Unfair Trade Practices and Consumer Protection Law). In light of this fact, it is logical for us to find that the statutory scheme also would not permit recovery for the concealment of facts in connection with the doctor-patient relationship, which is the equivalent of an implied statement in that regard. Thus, since appellants' claims were premised upon explicit and implied statements made during the course of Julie Sejpal's prenatal care, they support no cause of action arising under the Unfair Trade Practices and Consumer Protection Law. Accordingly, the trial court properly dismissed those claims.

Order affirmed.

**SUPERIOR COURT OF PENNSYLVANIA**
**PITTSBURGH DISTRICT**

| | | |
|---|---|---|
| Julie Sejpal, Vinod Sejpal and Erica Lynn Sejpal, a minor, by Julie Sejpal, her guardian, Appellants | : | |
| vs. | : | No. 581 Pittsburgh, 1992 |
| Corson Mitchell, et al | : | |

**J U D G M E N T**

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Cambria County be, and the same is hereby affirmed.

BY THE COURT:

/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

DATED: January 26, 1993

**SUPERIOR COURT OF PENNSYLVANIA**
**PITTSBURGH DISTRICT**

| | | |
|---|---|---|
| Julie Sejpal, Vinod Sejpal and Erica Lynn Sejpal, a minor, by Julie Sejpal, her guardian, Appellants | : | |
| vs. | : | No. 581 Pittsburgh, 1992 |
| Corson Mitchell, et al | : | |

## ORDER OF COURT

The court hereby denies the application filed February 9, 1993 requesting reargument or reconsideration of the decision dated January 26, 1993.

PER CURIAM"

Very truly yours,

/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

DATED: April 2, 1993

IN THE COURT OF COMMON PLEAS OF CAMBRIA COUNTY, PENNSYLVANIA
CIVIL DIVISION

| | | |
|---|---|---|
| JULIE SEJPAL, VINOD SEJPAL and ERICA LYNN SEJPAL, a minor, by Julie Sejpal, her guardian, | : | No. 1991-2288 |
| | : | ARGUMENT COURT |
| | : | JANUARY, 1992 |
| Plaintiffs | : | NO. 6353 |
| vs. | : | |
| CORSON, MITCHELL, TOMHAVE & McKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY and CONEMAUGH VALLEY MEMORIAL HOSPITAL, | : | |
| Defendants | : | |

**OPINION AND ORDER**

**LEAHEY, J.** - Defendants seek, by way of Preliminary Objections in the nature of Demurrer or Motion to Strike, dismissal of Plaintiffs' causes of action for "wrongful birth", "wrongful life" and breach of the Unfair Trade Practices and Consumer Protection Act. For the reasons which follow, we grant these objections and dismiss those counts of the Complaint. Defendants also raise several other objections which we grant in part and deny in part.

In Counts III, IX and XV of the Complaint, Julie and Vinod Sejpal, in their capacity as parents, set forth a purported cause of action for injuries and damages allegedly sustained by them as a result of the "wrongful birth" of their child, Erica Lynn Sejpal.

Specifically, Count III of the Complaint alleges "fraudulent misrepresentation (deceit) resulting in wrongful birth." Count IX of the Complaint seeks relief based upon "violation of Unfair Trade Practices and Consumer Protection Act . . . resulting in wrongful birth." Count XV of the Complaint alleges "medical malpractice resulting in wrongful birth."

No cause of action exists in Pennsylvania for wrongful birth and/or wrongful life. 42 Pa. C.S. 8305(a)(b). Contrary to Plaintiffs' contention, we find that these statutes do not violate the due process clause and other provisions of the United States Constitution. Therefore, we have no alternative but to dismiss all allegations of the Complaint pertaining to the "wrongful birth" and "wrongful life" purported causes of action.

We find, further, that Pennsylvania's Unfair Trade Practices and Protection Law (73 P.S. 201 *et seq.*) does not apply to the transactions between plaintiffs and defendants. Accordingly, all allegations in the Complaint pertaining to alleged causes of action based upon this Act will be dismissed.

The Complaint seeks damages in excess of $20,000 which is in violation of Pa. R.C.P. 1021(b). Therefore, those portions of the Complaint wherein damages are claimed in excess of $20,000 must be stricken for lack of conformity to law and rules of court.

Defendants have also, in their Preliminary Objections, moved to strike and/or compel a more specific complaint concerning various paragraphs of the Complaint. We will deny those portions of the Preliminary Objections, but will limit Plaintiffs to those theories of negligence specifically pled in the Complaint and we shall prohibit Plaintiffs from amplifying or expanding their theories of negligence against the Defendants.

ACCORDINGLY, WE ENTER THE FOLLOWING:

IN THE COURT OF COMMON PLEAS OF CAMBRIA
COUNTY, PENNSYLVANIA
CIVIL DIVISION

| | | |
|---|---|---|
| JULIE SEJPAL, VINOD SEJPAL and ERICA LYNN SEJPAL, a minor, by Julie Sejpal, her guardian, | : | No. 1991-2288 |
| | : | ARGUMENT COURT |
| | : | JANUARY, 1992 |
| Plaintiffs | : | NO. 6353 |
| vs. | : | |
| CORSON, MITCHELL, TOMHAVE & McKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY and CONEMAUGH VALLEY MEMORIAL HOSPITAL, | : | |
| Defendants | : | |

**ORDER**

NOW, this 4th day of March, 1992, Defendants' Preliminary Objections to Plaintiffs' Complaint are SUSTAINED in part and DENIED in part. It is ORDERED and DIRECTED as follows:

1. All allegations of the Complaint pertaining to "wrongful birth" and damages purportedly suffered as a result of said cause of action are hereby STRICKEN from the Complaint.

2. All allegations pertaining to "wrongful life" and the damages purportedly suffered as a result of said cause of action are hereby STRICKEN from the Complaint.

3. All allegations pertaining to the alleged causes of action based upon the Unfair Trade Practices and Consumer Protection

Act and the damages purportedly suffered as a result of violations of the Act are hereby STRICKEN from the Complaint.

4. Those portions of the Complaint claiming damages in excess of $20,000 as contained in the "wherefore" clauses of the Complaint are hereby STRICKEN from the Complaint.

5. Defendants' Motion to Strike and/or Compel a More Specific Complaint concerning various paragraphs of the Complaint is DENIED. However, it is DIRECTED that Plaintiffs be limited to the theories of negligence specifically pled in the Complaint, and Plaintiffs shall not be, without further order of court, permitted at any time in these proceedings to amplify and/or expand their theories of negligence against the Defendants.

BY THE COURT:

/s/
F. Joseph Leahey, J.

IN THE COURT OF COMMON PLEAS OF
CAMBRIA COUNTY, PENNSYLVANIA

| | | |
|---|---|---|
| JULIE SEJPAL and VINOD SEJPAL, and ERICA LYNN SEJPAL, a minor, by JULIE SEJPAL, Her guardian, Plaintiffs, | : | IN THE COURT OF COMMON PLEAS OF CAMBRIA COUNTY, PENNSYLVANIA |
| v. | : | |
| CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY and CONEMAUGH VALLEY MEMORIAL HOSPITAL, Defendants. | : | NO. 1991 - 2288 - A |

**NOTICE TO DEFEND**

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a Judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE

(Continued on Next Page)

THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Johnstown Legal Aid
THE JOHNSTOWN COUNTY BAR ASSOCIATION
7 Allegheny
Legal Aid Incorporated
500 Swank Building
616 Main Street
Johnstown, PA 15901

814-536-8917

**JURY TRIAL DEMANDED**

**COMPLAINT IN A CIVIL ACTION**

The plaintiffs, Julie Sejpal and Vinod Sejpal and Erica Lynn Sejpal, a minor, by Julie Sejpal, her guardian, by their counsel, Joseph E. Hudak and Behrend & Ernsberger, file this complaint in a civil action, and in support thereof respectfully submit as follows:

1. Plaintiffs Julie Sejpal and Vinod Sejpal are adult individuals residing in Cambria County, Pennsylvania.

2. Plaintiff Erica Lynn Sejpal is a minor individual residing in Cambria County, Pennsylvania. She was born on August 30, 1989. She is represented in the action by plaintiff Julie Sejpal, her mother, as her guardian. The address of plaintiff Julie Sejpal, as guardian for the minor Erica Lynn Sejpal, is c/o Behrend & Ernsberger, 2400 Grant Building, Pittsburgh, Pennsylvania 15219.

3. Defendant Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc. is a Pennsylvania corporation doing business in Cambria County, Pennsylvania.

4. Defendants Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley are adult individuals residing in and/or doing business in Cambria

County, Pennsylvania.

5. Defendant Conemaugh Valley Memorial Hospital is a Pennsylvania corporation doing business in Cambria County, Pennsylvania.

6. All of the acts and omissions about which plaintiffs complain took place in Cambria County, Pennsylvania.

7. In about January 1989, Plaintiff Julie Sejpal was pregnant.

8. In about January 1989, defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley were engaged in a family practice of medicine specializing in obstetrics and gynecology.

9. In about January 1989, defendants Corson, Mitchell, Tomhave and McKinley, M.D.S. Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley represented to the world in general and to plaintiffs Julie Sejpal and Vinod Sejpal that they were engaged in a family practice of medicine specializing in obstetrics and gynecology.

10. In reliance on these and past representations, plaintiffs Julie Sejpal and Vinod Sejpal placed themselves and their unborn baby, plaintiff Erica Lynn Sejpal, in the care of
defendants Corson, Mitchell, Tomhave and McKinley, M.D. S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley.

11. In about January 1989, plaintiff Julie Sejpal was thirty six (36) years old. Based on her age alone, she was in a category of women exhibiting a high risk of giving birth to a children with birth defects.

12. Further, in about March 1989, defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley caused blood to be drawn from plaintiff Julie Sejpal for a maternal serum alpha-fetalprotein (MSAFP) assay. The results of this test provided further information about the risk of plaintiff Julie Sejpal giving birth to a child with birth defects and showed that risk to be dramatically higher than normal, even for a woman her age. Indeed, the lab report even set forth the specific warning that defendants Corson, Mitchell,

Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley should advise plaintiff Julie Sejpal of the option of amniocentesis.

13. Under these circumstances, it was standard medical practice to perform an amniocentesis. Amniocentesis would have revealed to plaintiffs Julie Sejpal and Vinod Sejpal that their child was to be born with Down's Syndrome.

14. These circumstances presented plaintiffs Julie Sejpal and Vinod Sejpal had the option of terminating the pregnancy.

15. Under these circumstances, it was standard medical practice to recommend and/or provide family counseling.

16. Under these circumstances, it was standard medical practice to recommend and/or provide counseling regarding the possibility of additional children.

17. Under these circumstances, it was standard medical practice to advise persons in the position of plaintiffs of the option of terminating the pregnancy.

18. Nonetheless, defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley, refused to and/or failed to reveal to plaintiffs Julie Sejpal and Vinod Sejpal:

a. that based on her age alone, plaintiff Julie Sejpal was in a category of women exhibiting a high risk of giving birth to children with birth defects;

b. that the results of the maternal serum alpha-fetalprotein (MSAFP) assay provided further information about the risk of plaintiff Julie Sejpal giving birth to a child with birth defects and showed that risk to be dramatically higher than normal, even for a woman her age;

c. that the lab report on the maternal serum alpha-fetalprotein (MSAFP) assay indeed even set forth the specific warning that Defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley should advise plaintiff Julie Sejpal of the option of amniocentesis;

d. that amniocentesis would have revealed to plaintiffs

Julie Sejpal and Vinod Sejpal that their child was to be born with Down's Syndrome;

e. that plaintiffs Julie Sejpal and Vinod Sejpal had the option of terminating the pregnancy;

f. that is was standard medical practice under the circumstances to perform an amniocentesis;

g. that is was standard medical practice under the circumstances to provide family counseling;

h. that is was standard medical practice under the circumstances to provide counseling regarding the possibility of additional children;

i. that it was standard medical practice under the circumstances to provide advise persons in the position of plaintiffs of the option of terminating the pregnancy; and thus made express or implied false representation:

j. that based upon her age plaintiff Julie Sejpal was not in a category of women exhibiting a high risk of giving birth to a children with birth defects;

k. that the result of the maternal serum alpha-fetalprotein (MSAFP) assay did not provide further information about the risk of plaintiff Julie Sejpal giving birth to a child with birth defects and show that risk to be dramatically higher than normal, even for a woman her age;

l. that the lab report on the maternal serum alpha-fetalprotein (MSAFP) assay did not set forth the specific warning that defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley should not advise plaintiff Julie Sejpal of the option of amniocentesis;

m. that amniocentesis would not reveal to plaintiffs Julie Sejpal and Vinod Sejpal that their child was to be born with Down's Syndrome;

n. that plaintiffs Julie Sejpal and Vinod Sejpal did not have the option of terminating the pregnancy;

o. that it was not standard medical practice under the circumstances to perform an amniocentesis;

p. that it was not standard medical practice under the circumstances to provide family counseling;

q. that it was not standard medical practice under the circumstances to provide counseling regarding the possibility of additional children;

r. that it was not standard medical practice under the circumstances to provide advise persons in the position of plaintiffs of the option of terminating the pregnancy.

19. Defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley, refused and/or failed to reveal to plaintiffs Julie Sejpal and Vinod Sejpal the matters described in the preceding paragraphs 18 (a) through 18 (i), inclusive, either:

a. intentionally; and/or
b. recklessly; and/or
c. as a result of gross negligence; and/or
d. negligently.

20. Defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley made express or implied false representations as described in the preceding paragraphs 18 (j) through 18 (r), inclusive either:

a. intentionally; and/or
b. recklessly; and/or
c. as a result of gross negligence; and/or
d. negligently.

21. In the alternative, defendants Corson, Mitchell, Tomhave, and McKinley, M.D.S. Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R.McKinley, refused and/or failed to reveal to plaintiffs Julie Sejpal and Vinod Sejpal:

a. that based on her age alone, plaintiff Julie Sejpal was in a category of women exhibiting a high risk of giving birth to children with birth defects;

b. that the results of the materal serum alpha-fetal protein (MSAFP) assay provided further information about the risk of plaintiff Julie Sejpal giving birth to a child with birth defects and showed that risk to be dramatically higher than normal, even for a woman her age;

c. that the lab report on the maternal serum alpha-

fetalprotein (MSAFP) assay indeed even set forth the specific warning that defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley should advise plaintiff Julie Sejpal of the option of amniocentesis;

d. that amniocentesis would have revealed to plaintiffs Julie Sejpal and Vinod Sejpal that their child was to be born with Down's Syndrome;

e. that plaintiffs Julie Sejpal and Vinod Sejpal had the option of terminating the pregnancy;

f. that it was standard medical practice under the circumstances to perform an amniocentesis;

g. that it was standard medical practice under the circumstances to provide family counseling;

h.that it was standard medical practice under the circumstances to provide counseling regarding the possibility of additional children;

i. that it was standard medical practice under the circumstances to provide advise persons in the position of plaintiffs of the option of terminating the pregnancy.

22. Defendants Corson, Mitchell, Tomhave, and McKinley, M.D.S, Inc., Hampton Corson, donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley, refused and/or failed to reveal to plaintiffs Julie Sejpal and Vinod Sejpal the matters described in the preceding paragraphs 20 (a) through 20 (i), inclusive, either:

a. intentionally; and/or

b. recklessly; and/or

c. as a result of gross negligence; and/or

d. negligently.

23. In the alternative, defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley, concealed from plaintiffs Julie Sejpal and Vinod Sejpal:

a. that based on her age alone, plaintiff Julie Sejpal was in a category of women exhibiting a high risk of giving birth to a children with birth defects;

b. that the results of the maternal serum alpha-

fetalprotein (MSAFP) assay provided further information about the risk of plaintiff Julie Sejpal giving birth to a child with birth defects and showed that risk to be dramatically higher than normal, even for a woman her age;

c. that the lab report on the maternal serum alpha-fetalprotein (MSAFP) assay indeed even set forth the specific warning that defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley should advise plaintiff Julie Sejpal of the option of amniocentesis;

d. that amniocentesis would have revealed to plaintiffs Julie Sejpal and Vinod Sejpal that their child was to be born with Down's Syndrome;

e. that plaintiffs Julie Sejpal and Vinod Sejpal had the option of terminating the pregnancy;

f. that it was standard medical practice under the circumstances to perform an amniocentesis;

g. that it was standard medical practice under the circumstances to provide family counseling;

h. that it was standard medical practice under the circumstances to provide counseling regarding the possibility of additional children;

i. that it was standard medical practice under the circumstances to provide advise persons in the position of plaintiffs of the option of terminating the pregnancy.

24. Defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley, concealed from plaintiffs Julie Sejpal and Vinod Sejpal the matters described in the preceding paragraphs 18 (a) through 18 (i), inclusive, either:

a. intentionally; and/or

b. recklessly; and/or

c. as a result of gross negligence; and/or

d. negligently.

25. On or about August 30, 1989, defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc. Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley performed a Ceasarean section on plaintiff

Julie Sejpal.

26. On or about August 30, 1989, defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley, and Donald R. McKinley performed an elective tubal ligation, voluntary sterilization, on plaintiff Julie Sejpal.

27. On or about August 30, 1989, plaintiff Julie Sejpal gave birth to plaintiff Erica Lynn Sejpal, born with Down's Syndrome.

**Count I**

JULIE SEJPAL
v.
CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY

**FRAUDULENT MISREPRESENTATION (DECEIT) RESULTING IN CEASAREAN SECTION**

28. The above paragraphs 1 through 27, inclusive, are incorporated herein by reference.

29. Defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley, refused and/or failed to reveal to plaintiffs Julie Sejpal and Vinod Sejpal:

a. that based on her age alone, plaintiff Julie Sejpal was in a category of women exhibiting a high risk of giving birth to a children with birth defects;

b. that the results of the maternal serum alpha-fetalprotein (MSAFP) assay provided further information about the risk of plaintiff Julie Sejpal giving birth to a child with birth defects and showed that risk to be dramatically higher than normal, even for a woman her age;

c. that the lab report on the maternal serum alpha-fetalprotein (MSAFP) assay indeed even set forth the specific warning that defendants Corson, Mitchell, Tomhave and

McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. MckInley should advise plaintiff Julie Sejpal of the option of amniocentesis;

d. that amniocentesis would have revealed to plaintiffs Julie Sejpal and Vinod Sejpal that their child was to be born with Down's Syndrome;

e. that plaintiffs Julie Sejpal and Vinod Sejpal had the option of terminating the pregnancy;

f. that it was standard medical practice under the circumstances to perform an amniocentesis;

g. that it was standard medical practice under the circumstances to provide family counseling;

h. that it was standard medical practice under the circumstances to provide counseling regarding the possibility of additional children;

i. that it was standard medical practice under the circumstances to provide advise persons in the position of plaintiffs of the option of terminating the pregnancy; and thus made express or implied false representations:

j. that based upon her age plaintiff Julie Sejpal was not in a category of women exhibiting a high risk of giving birth to children with birth defects;

k. that the results of the maternal serum alpha-fetalprotein (MSAFP) assay did not provide further information about the risk of plaintiff Julie Sejpal giving birth to a child with birth defects and show that risk to be dramatically higher than normal, even for a woman her age;

l. that the lab report on the maternal serum alpha-fetalprotein (MSAFP) assay did not set forth the specific warning that defendants Corson, Mitchell, Tomhave and McKinley, M.D.s, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley should not advise plaintiff Julie Sejpal of the option of amniocentesis;

m. that amniocentesis would not reveal to plaintiffs Julie Sejpal and Vinod Sejpal that their child was to be born with Down's Syndrome;

n. that plaintiffs Julie Sejpal and Vinod Sejpal did not

have the option of terminating the pregnancy;

o. that it was not standard medical practice under the circumstances to perform an amniocentesis;

p. that it was not standard medical practice under the circumstances to proved family counseling;

q. that it was not standard medical practice under the circumstances to provide counseling regarding the possibility of additional children;

r. that it was not standard medical practice under the circumstances to provide advise persons in the position of plaintiffs of the option of terminating the pregnancy.

30. Defendants Corson, Mitchell, Tomhave and McKinley, M.D.S. Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley, refused and/or failed to reveal to plaintiffs Julie Sejpal and Vinod Sejpal the matters described in the preceding paragraphs 18 (a) through 18 (i), inclusive, either:

a. intentionally; and/or

b. recklessly; and/or

c. as a result of gross negligence; and/or

d. negligently.

31. Defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley made express or implied false representations as described in the preceding paragraphs 18 (j) through 18 (r), inclusive, either:

a. intentionally; and/or

b. recklessly; and/or

c. as a result of gross negligence; and/or

d. negligently.

32. Plaintiff Julie Sejpal would not have undergone the Ceasarean section performed by defendants Corson, Mitchell, Tomhave, and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley but for the acts described in the above paragraphs 29, 30, and 31.

33. As a result of the acts described in the above paragraphs 29, 30, and 31, on or about August 30, 1989 plaintiff Julie Sejpal did undergo as Ceasarean section.

34. As a result of the Ceasarean section performed by defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley, plaintiff suffered injuries as follows:

a. medical bills;
b. permanent injury;
c. pain and suffering;
d. emotional distress;
e. other injuries.

WHEREFORE plaintiff Julie Sejpal respectfully requests judgment in her favor and against defendants Corson, Mitchell, Tomhave, and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley in an amount in excess of twenty-thousand dollars ($20,000.00).

**Count II**

JULIE SEJPAL
v.
CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY

**FRAUDULENT MISREPRESENTATION (DECEIT) RESULTING IN TUBAL LIGATION AND STERILIZATION**

35. The above paragraphs 28 through 31, inclusive, are incorporated herein by reference.

36. Plaintiff Julie Sejpal would not have undergone tubal ligation and sterilization performed by defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley but for the acts described in the above paragraphs 28 through 31, inclusive.

37. As a result of the acts described in the above paragraphs 28 through 31, inclusive, on or about August 30, 1989 plaintiff Julie Sejpal did undergo a tubal ligation and sterilization.

38. As a result of the tubal ligation and sterilization performed by defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley, plaintiff suffered injuries as follows:

a. medical bills;
b. permanent injury;
c. permanent sterilization;
d. pain and suffering;
e. emotional distress;
f. other injuries.

WHEREFORE, plaintiff Julie Sejpal respectfully requests judgment in her favor and against defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley in an amount in excess of twenty-thousand dollars ($20,000.00).

**Count III**

JULIE SEJPAL and VINOD SEJPAL
v.
CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S, INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY

**FRAUDULENT MISREPRESENTATION (DECEIT) RESULTING IN WRONGFUL BIRTH**

39. The above paragraphs 29 through 31, inclusive, are incorporated herein by reference.

40. Plaintiff Julie Sejpal would not have given birth to her child plaintiff Erica Lynn Sejpal but for the acts described in the

above paragraphs 28 through 31, inclusive.

41. As a result of the acts described in the above paragraphs 28 through 31, inclusive, on or about August 30, 1989 plaintiff Julie Sejpal did give birth to her child Erica Lynn Sejpal.

42. As a result of the birth of Erica Lynn Sejpal plaintiffs Julie Sejpal and Vinod Sejpal suffered injuries as follows:

a. medical bills incidental to the birth;

b. medical bills incurred and to be incurred during a lifetime of raising and caring for a Down's Syndrome child;

c. pain and suffering;

d. emotional distress;

e. other injuries.

WHEREFORE, plaintiffs Julie Sejpal and Vinod Sejpal respectfully request judgment in their favor and against defendants Corson, Mitchell, Tomhave and McKinley, M.D.S. Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley in an amount in excess of twenty-thousand dollars ($20,000.00).

**Count IV**

JULIE SEJPAL

v.

CONEMAUGH VALLEY MEMORIAL HOSPITAL

**CORPORATE LIABILITY FOR FAILURE TO MONITOR AND REVIEW AND THUS PREVENT FRAUDULENT MISREPRESENTATION (DECEIT) RESULTING IN CEASAREAN SECTION**

43. The above paragraphs 28 through 31, inclusive, are incorporated herein by reference.

44. The acts about which plaintiff complains were provided within the facilities of defendant Conemaugh Valley Memorial Hospital.

45. Defendant Conemaugh Valley Hospital had a duty to exercise proper care for its patients and to supervise, monitor and

review the medical services provided by defendants Corson, Mitchell, Tomhave, and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley.

46. Defendant Conemaugh Valley Hospital breached its duty to exercise proper care for its patients and to supervise, monitor and review the medical services provided by defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley.

47. As a result of defendant Conemaugh Valley Memorial Hospital's breach of its duty as described in the above paragraphs 43 through 46, inclusive, plaintiff Julie Sejpal underwent the Ceasarean section performed by defendants Corson, Mitchell, Tomhave and Mckinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley.

48. Plaintiff Julie Sejpal would not have undergone the Ceasarean section performed by defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley but for defendant Conemaugh Valley Memorial Hospital's breach of its duty as described in the above paragraphs 43 through 46, inclusive.

49. As a result of defendant Conemaugh Valley Memorial Hospital's breach of its duty as described in the above paragraphs 43 through 46, inclusive, on or about August 30, 1989 plaintiff Julie Sejpal did undergo a Ceasarean section.

50. As a result of the Ceasarean section performed by defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley, and as a result of defendant Conemaugh Valley Memorial Hospital's breach of its duty as described in the above paragraphs 43 through 46, inclusive, plaintiff suffered injuries as follows:

a. medical bills;
b. permanent injury;
c. pain and suffering;
d. emotional distress;

e. other injuries.

WHEREFORE, plaintiff Julie Sejpal respectfully requests judgment in her favor and against defendant Conemaugh Valley Memorial Hospital in an amount in excess of twenty-thousand dollars ($20,000.00).

**Count V**

JULIE SEJPAL
v.
CONEMAUGH VALLEY MEMORIAL HOSPITAL

**CORPORATE LIABILITY FOR FAILURE TO MONITOR AND REVIEW AND THUS TO PREVENT FRAUDULENT MISREPRESENTATION (DECEIT) RESULTING IN TUBAL LIGATION AND STERILIZATION**

51. The above paragraphs 43 through 46, inclusive, are incorporated therein by reference.

52. As a result of defendant Conemaugh Valley Memorial Hospital's breach of its duty as described in the above paragraphs 43 through 46, inclusive, plaintiff Julie Sejpal underwent the tubal ligation and sterilization performed by defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley.

53. Plaintiff Julie Sejpal would not have undergone tubal ligation and sterilization performed by defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley but for defendant Conemaugh Valley Memorial Hospital's breach of its duty as described in the above paragraphs 43 through 46, inclusive.

54. As a result of the tubal ligation and sterilization performed by defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, INc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley,

and as a result of defendant Conemaugh Valley Memorial Hospital's breach of its duty as described in the above paragraphs 43 through 46, inclusive.

Plaintiff suffered injuries as follows:

a. medical bills;
b. permanent injury;
c. permanent sterilization;
d. pain and suffering;
e. emotional distress;
f. other injuries.

WHEREFORE, plaintiff Julie Sejpal respectfully requests judgment in her favor and against defendant Conemaugh Valley Memorial Hospital in an amount in excess of twenty-thousand dollars ($20,000.00).

**Count VI**

JULIE SEJPAL and VINOD SEJPAL
v.
CONEMAUGH VALLEY MEMORIAL HOSPITAL

**CORPORATE LIABILITY FOR FAILURE TO MONITOR AND REVIEW AND THUS PREVENT FRAUDULENT MISREPRESENTATION (DECEIT) RESULTING IN WRONGFUL BIRTH**

55. The above paragraphs 43 through 46, inclusive are incorporated herein by reference.

56. As a result of defendant Conemaugh Valley Memorial Hospital's breach of its duty as described in the above paragraphs 43 through 46, inclusive, plaintiff Julie Sejpal gave birth to her child plaintiff Erica Lynn Sejpal.

57. Plaintiff Julie Sejpal would not have given birth to her child plaintiff Erica Lynn Sejpal but for defendant Conemaugh Valley Memorial Hospital's breach of its duty as described in the above paragraphs 43 through 46, inclusive.

58. As a result of the birth of Erica Lynn Sejpal plaintiffs

Julie Sejpal and Vinod Sejpal suffered injuries as follows:

a. medical bills incidental to the birth;

b. medical bills incurred and to be incurred during a lifetime of raising and caring for a Down's Syndrome child;

c. pain and suffering;

d. emotional distress;

e. other injuries.

WHEREFORE, plaintiffs Julie Sejpal and Vinod Sejpal respectfully request judgment in their favor and against defendant Conemaugh Valley Memorial Hospital in an amount in excess of twenty-thousand dollars ($20,000.00).

**Count VII**

JULIE SEJPAL

v.

CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S, INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY

**VIOLATION OF UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT (73 P.S 201-1 ET SEQ.) RESULTING IN CEASAREAN SECTION**

59. The above paragraphs 28 through 34, inclusive are incorporated herein by reference.

60. The misrepresentations, omissions, and concealment of facts by defendants constituted unfair methods of competition and unfair or deceptive acts or practices within the meaning of the Pennsylvania Unfair Trade Practices and Consumer Protection Act (73 P.S. 201-1 et seq.).

61. Plaintiff suffered an ascertainable loss as the result of the defendants' use or employment of these unfair methods of competition and unfair or deceptive acts or practices.

WHEREFORE plaintiff seeks a judgment against defendants

in excess of twenty-thousands dollars ($20,000.00) which shall include an award in an amount to three times the actual damages sustained pursuant to the Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 P.S. 201-9.2).

**Count VIII**

JULIE SEJPAL
v.
CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S, INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY

**VIOLATION OF UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT (73 P.S. 201-1 ET SEQ.) RESULTING IN TUBAL LIGATION AND STERILIZATION**

62. The above paragraphs 35 through 38, inclusive are incorporated herein by reference.

63. The misrepresentations, omissions, and concealment of facts by defendants constituted unfair methods of competition and unfair or deceptive acts or practices within the meaning of the Pennsylvania Unfair Trade Practices and Consumer Protection Act (73-P.S. 201-1 et seq.).

64. Plaintiff suffered an ascertainable loss as the result of the defendants' use or employment of these unfair methods of competition and unfair or deceptive acts or practices.

WHEREFORE plaintiff seeks a judgment against defendants in excess of twenty-thousand dollars ($20,000.00) which shall include an award in an amount of three times the actual damages sustained pursuant to the Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 P.S. 201-9.2).

**Count IX**

JULIE SEJPAL and VINOD SEJPAL

v.

CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S, INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY

**VIOLATION OF UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT (73 P.S. 201-1 ET SEQ.) RESULTING IN WRONGFUL BIRTH**

65. The above paragraphs 39 through 42, inclusive are incorporated herein by reference.

66. The misrepresentations, omissions, and concealment of facts by defendants constituted unfair methods of competition and unfair or deceptive acts or practices within the meaning of the Pennsylvania Unfair Trade Practices and Consumer Protection Act (73 P.S. 201-1 et seq.).

67. Plaintiff suffered an ascertainable loss as the result of the defendants' use or employment of these unfair methods of competition and unfair or deceptive acts or practices.

WHEREFORE, plaintiff seeks a judgment against defendants in excess of twenty-thousand dollars ($20,000.00) which shall include an award in an amount of three times the actual damages sustained pursuant to the Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 P.S. 201-9.2).

**Count X**

JULIE SEJPAL

v.

CONEMAUGH VALLEY MEMORIAL HOSPITAL

**VIOLATION OF UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT (73 P.S. 201-1 ET SEQ.) RESULTING IN CEASAREAN SECTION**

68. The above paragraphs 43 through 50, inclusive are incorporated herein by reference.

69. The misrepresentations, omissions, and concealment of facts by defendants constituted unfair methods of competition and unfair or deceptive acts or practices within the meaning of the Pennsylvania Unfair Trade Practices and Consumer Protection Act (73 P.S. 201-1 et seq.).

70. Plaintiff suffered an ascertainable loss as the result of the defendants' use or employment of these unfair methods of competition and unfair or deceptive acts or practices.

WHEREFORE, plaintiff seeks a judgment against defendants in excess of twenty-thousands dollars ($20,000.00) which shall include an award in an amount of three times the actual damages sustained pursuant to the Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 P.S. 201-9.2).

**Count XI**

JULIE SEJPAL

v.

CONEMAUGH VALLEY MEMORIAL HOSPITAL

**VIOLATION OF UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT (73 P.S. 201-1 ET SEQ.) RESULTING IN TUBAL LIGATION AND STERILIZATION**

71. The above paragraphs 51 through 54, inclusive are incorporated herein by reference.

72. The misrepresentations, omissions, and concealment of facts by defendants constituted unfair methods of competition and unfair or deceptive acts or practices within the meaning of the Pennsylvania Unfair Trade Practices and Consumer Protection Act (73 P.S. 201-1 et seq.).

73. Plaintiff suffered an ascertainable loss as the result of the defendants' use or employment of these unfair methods of competition and unfair or deceptive acts or practices.

WHEREFORE, plaintiff seeks a judgment against defendants in excess of twenty-thousand dollars ($20,000.00) which shall include an award in an amount of three times the actual damages sustained pursuant to the Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 P.S. 201-9.2).

**Count XII**

JULIE SEJPAL and VINOD SEJPAL
v.
CONEMAUGH VALLEY MEMORIAL HOSPITAL

**VIOLATION OF UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT (73 P.S. 201-1 ET SEQ.) RESULTING IN WRONGFUL BIRTH**

74. The above paragraphs 55 through 58, inclusive are incorporated herein by reference.

75. The misrepresentations, omissions, and concealment of facts by defendants constituted unfair methods of competition and unfair or deceptive acts or practices within the meaning of the Pennsylvania Unfair Trade Practices and Consumer Protection Act (73 P.S. 201-1 et seq.).

76. Plaintiff suffered an ascertainable loss as the result of the defendants' use or employment of these unfair methods of competition and unfair or deceptive acts or practices.

WHEREFORE plaintiff seeks a judgment against defendants in excess of twenty-thousand dollars ($20,000.00) which shall include an award in an amount of three times the actual damages sustained pursuant to the Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 P.S. 201-9.2).

**Count XIII**

JULIE SEJPAL
v.
CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S,

INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY

**MEDICAL MALPRACTICE RESULTING IN CEASAREAN SECTION**

77. The above paragraphs 28 through 34, inclusive are incorporated herein by reference.

78. The injuries suffered by plaintiff were a direct and proximate result of the negligence and carelessness of defendants and their agents, servants and employees.

79. The damages incurred by plaintiff were a direct and proximate result of the negligence and carelessness of defendants and their agents, servants and employees.

WHEREFORE plaintiff Julie Sejpal respectfully requests judgment in her favor and against defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley in an amount in excess of twenty-thousand dollars ($20,000.00).

**Count XIV**

JULIE SEJPAL

v.

CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S, INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY

**MEDICAL MALPRACTICE RESULTING IN TUBAL LIGATION AND STERILIZATION**

80. The above paragraphs 35 through 38, inclusive are incorporated herein by reference.

81. The injuries suffered by plaintiff were a direct and proximate result of the negligence and carelessness of defendants

and their agents, servants and employees.

82. The damages incurred by plaintiff were a direct and proximate result of the negligence and carelessness of defendants and their agents, servants and employees.

WHEREFORE, plaintiff Julie Sejpal respectfully requests judgment in her favor and against defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley in an amount in excess of twenty-thousand dollars ($20,000.00).

**Count XV**

JULIE SEJPAL and VINOD SEJPAL
v.
CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S, INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY

**MEDICAL MALPRACTICE**
**RESULTING IN WRONGFUL BIRTH**

83. The above paragraphs 39 through 42, inclusive are incorporated herein by reference.

84. The injuries suffered by plaintiff were a direct and proximate result of the negligence and carelessness of defendants and their agents, servants and employees.

85. The damages incurred by plaintiff were a direct and proximate result of the negligence and carelessness of defendants and their agents, servants and employees.

WHEREFORE, plaintiff Julie Sejpal respectfully requests judgment in her favor and against defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley in an amount in excess of twenty-thousand dollars ($20,000.00).

## Count XVI

JULIE SEJPAL
v.
CONEMAUGH VALLEY MEMORIAL HOSPITAL

**HOSPITAL MALPRACTICE**
**RESULTING IN CEASAREAN SECTION**

86. The above paragraphs 43 through 50, inclusive are incorporated herein by reference.

87. THe injuries suffered by plaintiff were a direct and proximate result of the negligence and carelessness of defendant Conemaugh Valley Memorial Hospital and its agents, servants and employees.

88. The damages incurred by plaintiff were a direct and proximate result of the negligence and carelessness of defendant Conemaugh Valley Memorial Hospital and their agents, servants and employees.

WHEREFORE, plaintiff Julie Sejpal respectfully request judgment in her favor and against defendant Conemaugh Valley Memorial Hospital in an amount in excess of twenty-thousand dollars ($20,000.00).

## Count XVII

JULIE SEJPAL
v.
CONEMAUGH VALLEY MEMORIAL HOSPITAL

**HOSPITAL MALPRACTICE**
**RESULTING IN TUBAL LIGATION AND STERILIZATION**

89. The above paragraphs 51 through 54, inclusive are incorporated herein by reference.

90. The injuries suffered by plaintiff were a direct and proximate result of the negligence and carelessness of defendant Conemaugh Valley Memorial Hospital and its agents, servants

and employees.

91. The damages incurred by plaintiff were a direct and proximate result of the negligence and carelessness of defendant Conemaugh Valley Memorial Hospital and their agents, servants and employees.

WHEREFORE, plaintiff Julie Sejpal respectfully requests judgment in her favor and against defendant Conemaugh Valley Memorial Hospital in an amount in excess of twenty-thousand dollars ($20,000.00).

**Count XVIII**

JULIE SEJPAL and VINOD SEJPAL
v.
CONEMAUGH VALLEY MEMORIAL HOSPITAL

**HOSPITAL MALPRACTICE**
**RESULTING IN WRONGFUL BIRTH**

92. The above paragraphs 55 through 58, inclusive are incorporated herein by reference.

93. The injuries suffered by plaintiff were a direct and proximate result of the negligence and carelessness of defendant Conemaugh Valley Memorial Hospital and its agents, servants and employees.

94. The damages incurred by plaintiff were a direct and proximate result of the negligence and carelessness of defendant Conemaugh Valley Memorial Hospital and their agents, servants and employees.

WHEREFORE, plaintiffs Julie Sejpal and Vinod Sejpal respectfully request judgment in their favor and against defendant Conemaugh Valley Memorial Hospital in an amount in excess of twenty-thousand dollars ($20,000.00).

**Count XIX**

JULIE SEJPAL
v.
CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S, INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY

**FAILURE TO OBTAIN INFORMED CONSENT REGARDING CEASAREAN SECTION**

95. The above paragraphs 28 through 34, inclusive are incorporated herein by reference.

96. Defendants failed to obtain the informed consent of plaintiff for the Ceasarean section they performed.

WHEREFORE, plaintiff Julie Sejpal respectfully requests judgment in her favor and against defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley in an amount in excess of twenty-thousand dollars ($20,000.00).

**Count XX**

JULIE SEJPAL
v.
CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S, INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY

**FAILURE TO OBTAIN INFORMED CONSENT REGARDING TUBAL LIGATION AND STERILIZATION**

97. The above paragraphs 28 through 34, inclusive are incorporated herein by reference.

98. Defendants failed to obtain the informed consent of

plaintiff for the tubal ligation and sterilization they performed.

WHEREFORE, plaintiff Julie Sejpal respectfully requests judgment in her favor and against defendants Corson, Mitchell, Tomhave and McKinley, M.D.S, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley in an amount in excess of twenty-thousand dollars ($20,000.00).

**Count XXI**

ERICA LYNN SEJPAL, a minor,
by JULIE SEJPAL, her guardian,
v.
CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S, INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY
and
CONEMAUGH VALLEY MEMORIAL HOSPITAL

**WRONGFUL LIFE**

99. The above paragraphs 1 through 98 inclusive, are incorporated herein by reference.

100. As a result of the above described acts of defendants, plaintiff Erica Lynn Sejpal will be forced to live a life she would have chosen not to live.

101. As a result of the above described acts of defendants, plaintiff Erica Lynn Sejpal will suffer injuries as follows:

a. medical bills;
b. pain and suffering;
c. the need for special care throughout her lifetime;
d. mental suffering.

WHEREFORE, plaintiff Erica Lynn Sejpal, by her guardian, Julie Sejpal, respectfully requests judgment in her favor and

against defendants Corson, Mitchell, Tomhave and McKinley, M.D.s, Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley and Conemaugh Valley Memorial Hospital in an amount in excess of twenty-thousand dollars ($20,000.00)

Respectfully submitted,
BEHREND & ERNSBERGER

/s/
Joseph E. Hudak

| | | |
|---|---|---|
| JULIE SEJPAL and VINOD SEJPAL, and ERICA LYNN SEJPAL, a minor, by JULIE SEJPAL, Her guardian, Plaintiffs, | : | IN THE COURT OF COMMON PLEAS OF CAMBRIA COUNTY, PENNSYLVANIA |
| v. | : | |
| CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY and CONEMAUGH VALLEY MEMORIAL HOSPITAL, | : | CIVIL ACTION - LAW NO. 1991 - 2288 - A |
| Defendants. | : | JURY TRIAL DEMANDED |

**PRELIMINARY OBJECTIONS TO PLAINTIFFS' COMPLAINT**

NOW, come the Defendants, CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, and DONALD R. McKINLEY, by and through their Attorneys, JUBELIRER, CAROTHERS, KRIER & HALPERN, and file the within Preliminary Objections to Plaintiffs' Complaint and in support thereof aver as follows:

**DEMURRER / MOTION TO STRIKE**

1.

The within action is civil in nature filed by Plaintiffs, JULIE SEJPAL and VINOD SEJPAL, individually, and by Plaintiff, JULIE SEJPAL, in her capacity as guardian of their child, ERICA LYNN SEJPAL. In this matter, it is alleged, among other things, that due and owing to the alleged acts or omissions of these Defendants, Plaintiffs were caused to sustain serious injuries from which they now seek redress.

2.

In addition to the various allegations of negligence contained in Plaintiffs' Complaint, Plaintiffs, JULIE and VINOD SEJPAL, in their capacity as parents, set forth and/or purport to set forth a

cause of action for injuries and damages allegedly sustained by them as a result of the "Wrongful Birth" of their child, ERICA LYNN SEJPAL.

3.

Specifically, Count III of Plaintiffs' Complaint states in pertinent part as follows:

**JULIE SEJPAL and VINOD SEJPAL**

**v.**

**CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S. INC., HAMPTON, CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY**

**FRAUDULENT MISREPRESENTATION (DECEIT) RESULTING IN WRONGFUL BIRTH**

40. Plaintiff Julie Sejpal would not have given birth to her child plaintiff Erica Lynn Sejpal but for the acts described in the above paragraphs 28 through 31, inclusive.

4.

In the above-referenced Count III and paragraph 40 of Plaintiffs' Complaint, Plaintiffs set forth what purports to be a separate and independent cause of action based upon the "Wrongful Birth" of their child.

5.

Insofar as the aforesaid allegations as contained in Count III of Plaintiffs' Complaint attempts to set forth a cause of action for "Wrongful Birth," said allegations of Plaintiffs' Complaint are subject to demurrer, or in the alternative, said allegations should be stricken.

6.

Pennsylvania does not recognize a cause of action and/or a claim for damages based upon "Wrongful Birth." In fact, pertinent statutes of this Commonwealth expressly provide that no cause of action or award of damages shall exist on behalf of any person based on a claim that, but for an act or omission of the defendant(s), a person once conceived would not or should not

have been born. *See, 42 Pa.C.S.A. Section 8305(a).*

WHEREFORE, these Defendants respectfully request your Honorable Court to grant their demurrer to the Plaintiffs' Complaint with respect to Count III and Paragraph 40, or in the alternative, that the allegations pertaining to "Wrongful Birth" and damages purportedly suffered as a result of said cause of action be stricken from the Complaint for lack of conformity to law.

**DEMURRER / MOTION TO STRIKE**

7.

In addition to the various allegations of negligence contained in Plaintiffs' Complaint, Plaintiff, JULIE SEJPAL, in her capacity as guardian of Plaintiffs' child, ERICA LYNN SEJPAL, purportedly sets forth a cause of action for injuries and damages allegedly sustained by their child as a result of the "Wrongful Life" of their child, ERICA LYNN SEJPAL.

8.

Specifically, Count XXI of Plaintiffs' Complaint states in pertinent part as follows:

**ERICA LYNN SEJPAL, a minor,**
**by JULIE SEJPAL, her guardian,**
**v.**
**CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S. INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY**
**and**
**CONEMAUGH VALLEY MEMORIAL HOSPITAL**

**WRONGFUL LIFE**

100. As a result of the above described acts of defendants, plaintiff Erica Lynn Sejpal will be forced to live a life she would have chosen not to live.

9.

In the above-referenced Count XXI and Paragraph 100 of Plaintiffs' Complaint, Plaintiffs set forth what purports to be a separate and independent cause of action based upon the

"Wrongful Life" of their child.

10.

Insofar as the aforesaid allegations as contained in Count XXI and Paragraph 100 of Plaintiffs' Complaint attempt to set forth a cause of action for "Wrongful Life," said allegations of Plaintiffs Complaint are subject to demurrer, or in the alternative, said allegations should be stricken.

11.

Pennsylvania does not recognize a cause of action and/or a claim for damages based upon "Wrongful Life." In fact, pertinent statutes of this Commonwealth expressly provide that no cause of action shall exist on behalf of any person based on a claim of that person that, but for an act or omission of the defendant(s), that person, once conceived would or should have been aborted. *See, 42 Pa.C.S.A. Section 8305(b).*

WHEREFORE, these Defendants respectfully request your Honorable Court to grant their demurrer to the Plaintiffs' Complaint with respect to Count XXI and Paragraph 100, or in the alternative, that the allegations pertaining to "Wrongful Life" and damages purportedly suffered as a result of said cause of action be stricken from the Complaint for lack of conformity to law.

**DEMURRER / MOTION TO STRIKE**

12.

In addition to the various allegations of negligence contained in Plaintiffs' Complaint, Plaintiffs, JULIE and VINOD SEJPAL, in their capacity as parents, purportedly set forth a cause of action for injuries and damages allegedly sustained by them as a result of the "Wrongful Birth" of their child, ERICA LYNN SEJPAL. Said alleged cause of action is contained in the general cause of action entitled "Medical Malpractice."

13.

Specifically, Count XV of Plaintiffs' Complaint states in pertinent part as follows:

**JULIE SEJPAL and VINOD SEJPAL**

**v.**

**CORSON, MITCHELL, TOMHAVE and McKINLEY**

**M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY**

**MEDICAL MALPRACTICE RESULTING IN WRONGFUL BIRTH**

14.

In the above-referenced Count XXV of Plaintiffs' Complaint, Plaintiffs set forth what purports to be a separate and independent cause of action based upon the "Wrongful Birth" of their child. Said alleged cause of action is encaptioned in terms of a medical malpractice action.

15.

Insofar as the aforesaid allegations as contained in Count XXV of Plaintiffs' Complaint attempts to set forth a cause of action for "Wrongful Birth," said allegations of Plaintiffs' Complaint are subject to demurrer, or in the alternative, said allegations should be stricken.

16.

Pennsylvania does not recognize a cause of action and/or a claim for damages based upon "Wrongful Birth." In fact, pertinent statutes of this Commonwealth expressly provide that no cause of action or award of damages shall exist on behalf of any person based on a claim that, but for an act or omission of the defendant(s), a person once conceived would not or should not have been born. *See, 42 Pa.C.S.A. Section 8305(a).*

WHEREFORE, these Defendants respectfully request your Honorable Court to grant their demurrer to the Plaintiffs' Complaint with respect to Count XV, or in the alternative, that the allegations pertaining to "Wrongful Birth" and damages purportedly suffered as a result of said cause of action be stricken from the Complaint for lack of conformity to law.

**DEMURRER / MOTION TO STRIKE**

17.

In addition to the various allegations of negligence contained in Plaintiffs' Complaint, Plaintiffs, JULIE and VINOD SEJPAL, in their capacity as parents, purportedly set forth a cause of action

for injuries and damages allegedly sustained by them as a result of the "Wrongful Birth" of their child, ERICA LYNN SEJPAL. Said alleged cause of action is contained in the general cause of action under the Unfair Trade Practices and Consumer Protection Act, 73 P.S. Sections 201-1 et seq.

18.

Specifically, Count IX of Plaintiffs' Complaint states in pertinent part as follows:

**JULIE SEJPAL and VINOD SEJPAL**

**v.**

**CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY**

**VIOLATION OF UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT (73 P.S. 201-1 ET SEQ.) RESULTING IN WRONGFUL BIRTH**

66. The misrepresentations, omissions, and concealment of facts by defendants constituted unfair methods of competition and unfair or deceptive acts or practices within the meaning of the Pennsylvania Unfair Trade Practices and Consumer Protection Act (73 P.S. 201-1 et seq.)

19.

In the above-referenced Count and Paragraph of Plaintiffs' Complaint, Plaintiffs set forth what purports to be a separate and independent cause of action based upon the "Wrongful Birth" of their child. Said alleged cause of action is contained within the general cause of action based upon the Unfair Trade Practices and Consumer Protection act, 73 P.S. Sections 201-1 et seq.

20.

Insofar as the aforesaid allegations as contained in Count IX and Paragraph 66 of Plaintiffs' Complaint attempt to set forth a cause of action for "Wrongful Birth," said allegations of Plaintiffs' Complaint are subject to demurrer, or in the alternative, said allegations should be stricken.

21.

Pennsylvania does not recognize a cause of action and/or a claim for damages based upon "Wrongful Birth." In fact, pertinent statutes of this Commonwealth expressly provide that no cause of action or award of damages shall exist on behalf of any person based on a claim that, but for an act or omission of the defendant(s), a person once conceived would not or should not have been born. *See, 42 Pa.C.S.A. Section 8305(a).*

WHEREFORE, these Defendants respectfully request your Honorable Court to grant their demurrer to the Plaintiffs' Complaint with respect to Count IX and Paragraph 66, or in the alternative, that the allegations pertaining to "Wrongful Birth" and damages purportedly suffered as a result of said cause of action be stricken from the Complaint for lack of conformity to law.

**DEMURRER / MOTION TO STRIKE**

22.

In addition to the various allegations of negligence contained in Plaintiffs' Complaint, Plaintiffs, JULIE and VINOD SEJPAL, in their capacity as parents, purportedly set forth various causes of action for injuries and damages suffered as a result of alleged acts, omissions and/or misrepresentations by these Defendants. Said alleged causes of action are contained in several Counts asserting a cause of action based upon the Unfair Trade Practices and Consumer Protection Act, 73 P.S. Sections 201-1 et seq.

23.

Specifically, Counts VII, VIII, IX, X, XI, and XII of Plaintiffs' Complaint purportedly assert causes of action against these Defendants, either directly or by implication, upon the basis that said Defendants allegedly violated the Unfair Trade Practices and Consumer Protection Act, 73 P.S. Sections 201-1 et seq., by their asserted omissions, concealment of facts and/or misrepresentations in the rendering of medical services.

24.

Insofar as the aforesaid allegations as contained in the above-enumerated Counts of Plaintiffs' Complaint attempt to set forth a cause of action based upon the Unfair Trade Practices and Consumer Protection Act against these Defendants, either directly or by implication, said allegations of Plaintiffs' Complaint are

subject to demurrer, or in the alternative, said allegations should be stricken.

25.

The law of this Commonwealth is clear in this respect. Although the Act does not expressly exclude the services performed by physicians, it is equally clear that the legislature did not intend the Act to apply to physicians rendering medical services. *See, Gatten v. Merzi*, 397 Pa.Super. 148, 579 A.2d 974 (1990).

WHEREFORE, these Defendants respectfully request your Honorable Court to grant their demurrer to the Plaintiffs' Complaint with respect to Counts VII, VIII, IX, X, XI, and XII, insofar as said counts implicate these defendants, either directly or by implication, or in the alternative, that the allegations pertaining to the alleged causes of action based upon the Unfair Trade Practices and Consumer Protection Act, 73 Pa.C.S.A., Section 201-1 et seq., and damages purportedly suffered as a result of violations of the Act be stricken from the Complaint for lack of conformity to law.

**MOTION TO STRIKE**

26.

In addition to the various allegations of negligence contained in Plaintiffs' Complaint, Plaintiffs, JULIE and VINOD SEJPAL, in their capacity as parents, purportedly set forth various causes of action for injuries and damages suffered as a result of alleged acts, omissions and/or misrepresentations by these Defendants. Said alleged cause of action are contained in several counts asserting a cause of action based upon the Unfair Trade Practices and Consumer Protection Act, 73 P.S. Sections 201-1 et seq.

27.

Specifically, Counts VII, VIII, and IX of Plaintiffs' Complaint purportedly assert causes of action against these Defendants upon the basis that said Defendants allegedly violated the Unfair Trade Practices and Consumer Protection Act, 73 P.S. Sections 201-1 et seq., by alleged omissions, concealment of facts and/or misrepresentations.

28.

By reference, Plaintiffs incorporate in the above-enumerated Counts claims for damages as a result of the alleged pain and suffering and emotional distress arising out of the purported conduct of these Defendants. Said conduct allegedly amounts to a violation of said Act.

29.

The Unfair Trade Practices and Consumer Protection Act, 73 P.S. Sections 201-1 et seq., permits recovery by private action those damages which are ascertainable losses of money and/or property, real or personal, as a result of a violation of said Act. *See, 73 P.S. Section 9.2(a).*

30.

However, recovery for alleged injuries arising out of pain and suffering and/or emotion distress are not duly ascertainable so as to be recoverable under the Act. *See, In re Bryant*, 111 B.R. 474 (E.D. Pa. 1990).

31.

Insofar as the aforesaid allegations as contained in Counts VII, VIII, and IX of Plaintiffs' Complaint attempt to set forth claims for damages arising from purported pain and suffering and/or emotional distress based upon the Unfair Trade Practices and Consumer Protection Act, said allegations Plaintiffs' Complaint should be stricken.

WHEREFORE, these Defendants respectfully request your Honorable Court to grant their demurrer to strike the Plaintiffs' Complaint with respect to Counts VII, VIII, and IX, insofar as Plaintiffs alleged damages arising out of purported pain and suffering and/or emotional distress under the Unfair Trade Practices and Consumer Protection Act, 73 Pa.C.S.A., Section 201-1 et seq., for lack of conformity to law.

**MOTION TO STRIKE**

32.

Plaintiffs, throughout their Complaint, assert that they have suffered damages "in an amount in excess of twenty-thousand dollars
($20,000.00)." Said allegations are uniformly contained in the "WHEREFORE" clauses of said Complaint.

33.

Relevant to this motion to strike, Pennsylvania Rule of Civil Procedure No. 1021 states in pertinent part as follows:

> (b) Any pleading demanding relief for unliquidated damages shall without claiming any specific sum set forth **only** whether the amount is or is not in excess of **$10,000**.

34.

A motion to strike is appropriate to strike off a pleading, or portion thereof, because of lack of conformity to law or rule of court. *See, Pa.R.C.P. No. 1017(b)(2).* Insofar as the aforesaid allegations as contained in the "WHEREFORE" clauses of Plaintiffs' Complaint attempt to set forth claims for damages in excess of twenty-thousand dollars ($20,000.00), said allegations of Plaintiffs' Complaint should be stricken.

WHEREFORE, these Defendants respectfully request your Honorable Court to grant their motion to strike the Plaintiffs' Complaint with respect the allegations of damages in excess of twenty-thousand dollars ($20,000.00), as contained in the "WHEREFORE" clauses of said Complaint, for lack of conformity to law and/or rule of court.

**MOTION TO STRIKE AND/OR COMPEL A MORE SPECIFIC COMPLAINT**

35.

In addition to the various allegations of negligence contained in Plaintiffs' Complaint, Plaintiffs, JULIE and VINOD SEJPAL, in their capacity as parents, and JULIE SEJPAL, in her capacity as guardian for their child, ERICA LYNN SEJPAL, state and/or incorporate by reference language which may be construed as setting forth a claim for punitive damages.

36.

Specifically, Paragraphs 19, 20, 22, 24, 30, 31, as well as those paragraphs which incorporate the above-enumerated Paragraphs of Plaintiffs' Complaint, utilize the terms "intentionally" and "recklessly," the same of which may purportedly support a claim for punitive damages.

37.

Insofar as the above-referenced allegations are construed to support a claim for punitive damages, Plaintiffs have failed to state with specificity material facts upon which to base said claim. Pursuant to Pennsylvania Rule of Civil Procedure No. 1019(a), a claim such as is now in question relative to punitive damages shall contain material facts stated in a concise and summary form.

38.

A motion to strike is appropriate to strike off a pleading, or portion thereof, because of lack of conformity to law or rule of court. *See, Pa.R.C.P. No. 1017(B)(2).* Insofar as the aforesaid allegations as contained in the above-enumerated Paragraphs of Plaintiffs' Complaint, as well as those paragraphs which incorporate the same by reference, attempt to set forth a claim for punitive damages, said allegations of Plaintiffs' Complaint should be stricken.

WHEREFORE, these Defendants respectfully request your Honorable Court to grant their motion to strike the Plaintiffs' Complaint with respect the allegations as contained in Paragraphs 19, 20, 22, 24, 30, and 31, as well as those paragraphs that incorporate the above-enumerated Paragraphs of Plaintiffs' Complaint by reference, as the same purports to set forth a claim for punitive damages without alleging material facts which support said cause of action, contrary to Pennsylvania Rule of Civil Procedure No. 1019(a).

**MOTION TO STRIKE AND/OR COMPEL A MORE SPECIFIC COMPLAINT**

39.

Paragraphs 77, 78, 81, 82, 84, 85, 87, 88, 90, and 91 of Plaintiffs' Complaint, the same of which are now in question, allege in pertinent part as follows:

> The injuries suffered by plaintiff were a direct and proximate result of the negligence and carelessness of defendants and their agents, servants and employees.
>
> The damages incurred by plaintiff were a direct and proximate result of the negligence and carelessness of defendants and their agents, servants and employees.

40.

The allegations delineated in the above-referenced Paragraphs of Plaintiffs' Complaint fail to allege with specificity the material facts upon which such allegations may be based and are therefore in direct violation of Pa.R.C.P. No. 1019(a).

Plaintiffs set forth allegations of "negligence and carelessness" in each of the foregoing Paragraphs. Although each Paragraph now at issue is preceded with an incorporation clause, the use of these phrases allows Plaintiffs' to plead negligence and carelessness in a general manner.

41.

Such general allegations as refereed to above can be read to encompass every recognized theory of negligence in contravention to the principle enunciated in *Connor v. Allegheny General Hospital*, 501 Pa. 306, 461 A.2d 600 (1983).

WHEREFORE, these Defendants respectfully request your Honorable Court to grant their motion to strike the Plaintiffs' Complaint with respect the allegations as contained in Paragraphs 77, 78, 81, 82, 84, 85, 87, 88, 90. and 91, the same of which were delineated above, as a result of Plaintiffs' failure to allege with specificity any material facts which support said cause of action, contrary to Pennsylvania Rule of Civil Procedure NO. 1019(a) and relevant case law.

JUBELIRER, CAROTHERS, KRIER & HALPERN
By:/s/_____

Frank J. Stanek, Esquire
PA I.D. #50487
Park View Center
Ten Sheraton Drive
Altoona, PA 16601
(814) 943-1149

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the foregoing **Preliminary Objections** on all counsel of record and/or parties of interest by depositing same in the United States Mail, postage prepaid at Altoona, Pennsylvania on this 10th day of December, 1991, and addressed as follows:

Kenneth W. Behrend, Esquire
BEHREND AND ERNSBERGER
2400 Grant Building
Pittsburgh, PA 15219

Frank J. Hartye, Esquire
PFAFF, McINTYRE, DUGAS & HARTYE
P.O. Box 533
Hollidaysburg, PA 16648

JUBELIRER, CAROTHERS, KRIER & HALPERN

By:/s/_____
Frank J. Stanek, Esquire
PA I.D. #50487

| | | |
|---|---|---|
| JULIE SEJPAL and VINOD SEJPAL, and ERICA LYNN SEJPAL, a minor, by JULIE SEJPAL, her guardian, Plaintiffs, | : | IN THE COURT OF COMMON PLEAS OF CAMBRIA COUNTY, PENNSYLVANIA |
| vs. | : | |
| CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY and CONEMAUGH VALLEY MEMORIAL HOSPITAL, Defendants. | : | NO. 1991 - 2288 - A |

**PRELIMINARY OBJECTIONS TO PLAINTIFFS' COMPLAINT**

AND NOW, comes the Defendant, CONEMAUGH VALLEY MEMORIAL HOSPITAL, by and through its attorneys, PFAFF, McINTYRE, DUGAS & HARTYE, and files that following Preliminary Objections to Plaintiffs' Complaint.

1. Plaintiff initiated the within action by filing a Writ of Summons. Thereafter Plaintiff filed a Complaint against each of the named Defendants.

2. Counts VI, XII and XVIII attempt set forth a cause of action against Defendant hospital for "wrongful birth." No such cause of action exists in Pennsylvania at this time and therefore Counts VI, XII and XVII should be dismissed.

3. Counts X, XI and XII of Plaintiffs' Complaint allege liability against Defendant hospital based upon the Consumer Protection Law 73 P.S. Section 201 et seq.

4. The Plaintiffs' Complaint does not contain any facts upon which it can be concluded that the Defendant sold services primarily for personal, family or household to the Plaintiff, or that said services were sold in the stream of commerce or trade.

5. The Unfair Trade Practice and Consumer Protection Law pertains to fraudulent or deceitful practices of those individuals in sales or services, dealing in trade or commerce.

6. The Plaintiffs fail to state a cause of action in

Counts X, XI and XII against Conemaugh Valley Memorial Hospital based upon the Unfair Trade Practices and Consumer Protection Law. Therefore, Defendant respectfully requests that counts X, XI and XII be dismissed with prejudice.

7. The allegations in Plaintiffs' Complaint against Conemaugh Valley Memorial Hospital are based upon corporate liability for the actions of the Defendant physicians. Conemaugh Valley Memorial Hospital hereby incorporates by reference any and all Preliminary Objections which may be filed on behalf of the Defendant physicians as though the same were set forth herein at length.

WHEREFORE, Defendant, Conemaugh Valley Memorial Hospital requests this Court to grant its Preliminary Objections as more specifically set forth above.

PFAFF, McINTYRE, DUGAS & HARTYE

/s/ **FRANK J. HARTYE**
Attorneys for Defendant,
**CONEMAUGH VALLEY MEMORIAL HOSPITAL**
FRANK J. HARTYE, ESQUIRE
PA I.D. #25568
P. O. Box 533
Hollidaysburg, PA 16648-0533
(814) 696-3581

TO: **THE WITHIN NAMED PARTIES**
You are hereby notified to plead to
the enclosed **PRELIMINARY OBJECTIONS**
within twenty (2) days of service
hereof a default judgment may be
entered against you.

/s/ **FRANK J. HARTYE**
Attorneys for Defendant,
**CONEMAUGH VALLEY MEMORIAL HOSPITAL**

| | | |
|---|---|---|
| JULIE SEJPAL and VINOD SEJPAL, and ERICA LYNN SEJPAL, a minor, by JULIE SEJPAL, her guardian, Plaintiffs, | : | IN THE COURT OF COMMON PLEAS OF CAMBRIA COUNTY, PENNSYLVANIA |
| vs. | : | |
| CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY and CONEMAUGH VALLEY MEMORIAL HOSPITAL, Defendants. | : | NO. 1991 - 2288 - A |

**PLAINTIFFS' ANSWER TO PRELIMINARY OBJECTIONS OF DEFENDANTS CORSON, MITCHELL, TOMHAVE & McKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY and DONALD R. McKINLEY**

The plaintiffs, by their counsel, Joseph E. Hudak, file this answer to the preliminary objections of defendants Corson, Mitchell, Tomhave & McKinley, M.D.S., Inc., Hampton Corson, Donald Mitchell, Robert Tomhave, Richard G. McKinley and Donald R. McKinley, and in support thereof respectfully submit as follows:

I.

1. Defendant's preliminary objections raise 42 Pa.C.S. 8305(a) and (b). These provide:

> "(a) Wrongful birth -- There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should have been born. . . .
>
> "(b) Wrongful Life -- There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted."

2. If enforced by Pennsylvania courts, these statutes will have the effect of depriving plaintiffs of various constitutionally protected rights. Specifically, the plaintiffs will be deprived of the right to property, the right to access to court, the right to privacy, and other rights under *Roe v. Wade*, 410 U.S. 113 (1973), the Due Process Clause, and other provisions of the United States Constitution.

3. Moreover, if enforced by the Pennsylvania courts, these statutes will have the effect of chilling the exercise of the right to property, the right to access to court, the right to privacy, and other rights under *Roe v. Wade*, 410 U.S. 113 (1973), the Due Process Clause, and other provisions of the United States Constitution by all women and all unborn children in the state of Pennsylvania.

4. These statutes violate the United States Constitution and should not be enforced.

II.

5. In addition, Defendants' preliminary objections contend that the Pennsylvania Consumer Protection Law, 73 P.S. 201 *et seq.* does not apply to the transactions between plaintiffs and defendants.

6. This is incorrect. The Pennsylvania Consumer Protection Law, 73 P.S. 201 *et seq.* does and/or should apply to the transactions between plaintiffs and defendants.

WHEREFORE, plaintiffs respectfully request that the preliminary objections of defendant Conemaugh Valley Memorial Hospital be overruled.

Respectfully submitted,

/s/_____

Joseph E. Hudak
Counsel for Plaintiffs
2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515

## CERTIFICATE OF SERVICE

I, Joseph E. Hudak, counsel for plaintiffs, certify that this 31st day of January, 1992 I served true and correct copies of the foregoing answer to preliminary objections upon the followinjg [sic] by regular mail and/or hand delivery:

Pfaff, McIntyre, Dugas & Hartye
P.O. Box 533
Holidaysburg, Pa 16648--0533
Jubelier, Carothers, Krier & Halpern
10 Sheraton Drive
Altoona, Pa 16603

/s/
Joseph E. Hudak

| | | |
|---|---|---|
| JULIE SEJPAL and VINOD SEJPAL, and ERICA LYNN SEJPAL, a minor, by JULIE SEJPAL, her guardian, Plaintiffs, | : | IN THE COURT OF COMMON PLEAS OF CAMBRIA COUNTY, PENNSYLVANIA |
| vs. | : | |
| CORSON, MITCHELL, TOMHAVE and McKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY and CONEMAUGH VALLEY MEMORIAL HOSPITAL, Defendants. | : | NO. 1991 - 2288 - A |

**PLAINTIFFS' ANSWER TO PRELIMINARY OBJECTIONS OF DEFENDANT CONEMAUGH VALLEY MEMORIAL HOSPITAL**

The plaintiffs, by their counsel, Joseph E. Hudak, file this answer to the preliminary objections of defendant Conemaugh Valley Memorial Hospital, and in support thereof respectfully submit as follows:

I.

1. Defendant's preliminary objections raise 42 Pa.C.S. 8305(a) and (b). These provide:

> "(a) Wrongful birth -- There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should have been born. . . .
>
> "(b) Wrongful Life -- There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted."

2. If enforced by Pennsylvania courts, these statutes will have the effect of depriving plaintiffs of various constitutionally protected rights. Specifically, the plaintiffs will be deprived of the right to property, the right to access to court, the right to

privacy, and other rights under *Roe v. Wade*, 410 U.S. 113 (1973), the Due Process Clause, and other provisions of the United States Constitution.

3. Moreover, if enforced by the Pennsylvania courts, these statutes will have the effect of chilling the exercise of the right to property, the right to access to court, the right to privacy, and other rights under *Roe v. Wade*, 410 U.S. 113 (1973), the Due Process Clause, and other provisions of the United States Constitution by all women and all unborn children in the state of Pennsylvania.

4. These statutes violate the United States Constitution and should not be enforced.

II.

5. In addition, Defendant's preliminary objections contend that the Pennsylvania Consumer Protection Law, 73 P.S. 201 *et seq.* does not apply to the transactions between plaintiffs and defendants.

6. This is incorrect. The Pennsylvania Consumer Protection Law, 73 P.S. 201 *et seq.* does and/or should apply to the transactions between plaintiffs and defendants.

WHEREFORE, plaintiffs respectfully request that the preliminary objections of defendant Conemaugh Valley Memorial Hospital be overruled.

Respectfully submitted,

/s/_____

Joseph E. Hudak
Counsel for Plaintiffs
2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515

## CERTIFICATE OF SERVICE

I, Joseph E. Hudak, counsel for plaintiffs, certify that this 31st day of January, 1992 I served true and correct copies of the foregoing answer to preliminary objections upon the followinjg [sic] by regular mail and/or hand delivery:

Pfaff, McIntyre, Dugas & Hartye
P.O. Box 533
Holidaysburg, Pa 16648--0533
Jubelier, Carothers, Krier & Halpern
10 Sheraton Drive
Altoona, Pa 16603

/s/_____
Joseph E. Hudak

SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PITTSBURGH

---

NO. 581 PITTSBURGH, 1992

---

JULIE SEJPAL AND VINOD SEJPAL AND ERICA LYNN SEJPAL, A MINOR, BY JULIE SEJPAL, HER GUARDIAN
Appellants,

v.

CORSON, MITCHELL, TOMHAVE & MCKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE,
RICHARD G. MCKINLEY, DONALD R. MCKINLEY AND CONEMAUGH VALLEY MEMORIAL HOSPITAL
Appellees.

---

**APPLICATION FOR REARGUMENT OF THE OPINION AND ORDER FILED BY THIS COURT ON JANUARY 26, 1993**

---

Appeal from the March 4, 1992 Order of the Court of Common Pleas of Cambria County, Pennsylvania Civil Division, No. 1991-2288-A

---

Kenneth W. Behrend
Pa. I.D. #00406
BEHREND AND ERNSBERGER
Firm #018
2400 Grant Building
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(412) 391-2515
Counsel for Appellants

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## APPLICATION FOR REARGUMENT

THE APPELLANTS, JULIE SEJPAL AND VINOD SEJPAL, AND ERICA LYNN SEJPAL, A MINOR, BY JULIE SEJPAL, HER GUARDIAN, HEREIN, SEJPALS, respectfully request that this Honorable Court grant reargument in order to address the January 26, 1993 Opinion and Order of the Superior Court of Pennsylvania entered at No. 581 Pittsburgh 1992 (See Appendix I). The specific part of said opinion relevant to this Application for Reargument states as follows:

> "...appellants contend that the statutory preclusions place an impermissible burden on a woman's right to an abortion and thus, are unconstitutional under Planned Parenthood v. Casey, 505 U.S. __, 112 S.Ct. 2791, 120 L.Ed. 2d 674 (1992). We find this issue waived since the Commonwealth was not a party to the action and our examination of the record reveals no indication that appellants provided the Attorney General of Pennsylvania with notice of their constitutional challenge in accordance with Pa.R.A.P. 521(a)."
> (Pennsylvania Superior Court Opinion No. 581 Pittsburgh 1992, Page 7, Lines 1 - 9)

The Sejpals' Application for Reargument is based upon the Pennsylvania Superior Court's failure to follow a rule of law and the misapprehending of facts within the Sejpals' appeal. The Superior Court judges have not followed the rule of law that permits constitutional arguments of Pennsylvania statutes with notice given to the Attorney General of Pennsylvania. The judges have overlooked or misapprehended the statutory sufficiency of the repeated notices given to the Attorney General of Pennsylvania by the Sejpals. This Court found a waiver of the issue of the Sejpals' appeal dealing with the constitutional challenge of a statute.

Said waiver was due to this Court's contention that the Sejpals failed to provide Notice to the Attorney General of Pennsylvania as prescribed for under Pa. R.A.P. 521 (a).

Upon a review of the Sejpals' actions, and a review of the record it is evident that the Sejpals did comply with the provisions for providing Notice to the Pennsylvania Attorney General in appeals that challenge the constitutionality of a statute. Pa. R.A.P. 521 (a) states:

> "**(a) Notice**. It shall be the duty of a party who draws in question the constitutionality of any statute in any matter in an appellate court to which the Commonwealth or any officer thereof, upon the filing of the record, or as soon thereafter as the question is raised in the appellate court, *to give immediate notice in writing to the Attorney General of Pennsylvania of the existence of the question*; together with a copy of the pleadings or other portion of the record raising the issue, and *to file proof of service of such notice*." (Emphasis added).

The Sejpals complied with the Notice requirement of Pa. R.A.P. 521 (a) in the following ways:

(a) The Sejpals' Pennsylvania Superior Court Civil Docketing Statement (See Exhibit 1) for this appeal was sent via first class mail to Thomas Halloran, Senior Deputy Attorney General at the Pennsylvania Office of the Attorney General. The letter establishing this is attached hereto as Exhibit 2.

(b) The Sejpals' Motion for Continuance of the Appeal (See Exhibit 3) was sent via first class mail to Thomas Halloran, Senior Deputy Attorney General at the Pennsylvania Office of the Attorney General. The letter establishing this is attached hereto as Exhibit 4.

(c) The Sejpals' Brief (See Exhibit 5) and Reproduced Record for this appeal was sent via first class mail to Thomas Halloran, Senior Deputy Attorney General at the Pennsylvania Office of the Attorney General. The letter

establishing this is attached hereto as Exhibit 6.

The Sejpals complied with the Proof of Service requirement of Pa. R.A.P. 521 (a) in the following ways:

(a) The Sejpals' Motion for Continuance of the Appeal had a Proof of Service attached to it which stated in part:

> "I, hereby certify that a true and correct copy of the above was mailed by U.S. First Class Mail, postage prepaid, on this 12th day of June, 1992, to the following:
>
> Thomas Halloran, Esquire
> Office of the Attorney General
> Manor Building
> 564 Forbes Avenue
> Pittsburgh, PA 15219."
> (See Exhibit 3).

The Sejpals' Brief and Reproduced Record for this appeal had a Proof of Service attached which stated in part:

> "I, hereby certify that a true and correct copy of the foregoing has been mailed by First Class Mail, postage prepaid, pursuant to PA. R.A.P., Rule 121, this 17 day of July, 1992, addressed as follows:
>
> Thomas Halloran, Esquire
> Office of the Attorney General
> Manor Building
> 564 Forbes Avenue
> Pittsburgh, PA 15219."
> (See Exhibit 5).

The Sejpals have given the Pennsylvania Office of the Attorney General written notice of their appeal and the constitutional issue contained within on three separate occasions, (See exhibits 1,2,3,4,5 and 6), and have filed Proofs of Service providing said Notice to the Pennsylvania Office of the Attorney General within this Court on two separate occasions (See Exhibits

3 and 5). Said Proofs of Service are of record with this Court and can be found attached to the Sejpals' Motion for Continuance of the Appeal and the Sejpals' Brief.

Based upon this Court's apparent failure to follow a rule of law and its misapprehending of the facts relative to the Sejpals' compliance with Pa. R.A.P. 521 (a), the Sejpals respectfully request that this Honorable Court grant reargument on the waiver of their constitutional challenge to Pa. C.S. 8305 (a) and (b).

The Sejpals have gone belt and suspenders above the requirements of Pa. R.A.P. 521 (a).

Respectfully Submitted,
BEHREND & ERNSBERGER

/s/_____
Kenneth W. Behrend
Attorney for Appellants

"Appendix A Omitted"

"Appendix B Omitted"

"Exhibit 1 Omitted"

**BEHREND AND ERNSBERGER**
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Thomas Halloran, Esq.
Office of the Attorney General
Manor Building
564 Forbes Avenue
Pittsburgh, PA 15219

Re: *Sejpal et.al. v Corson et. al.*
Superior Court Docket No 581PGH1992

Dear Gentlemen:

Enclosed please find a copy of the Superior Court of Pennsylvania Civil Docket Statement duly files on this day in the above captioned matter.

Very truly yours,
Behrend and Ernsberger
/s/_____
Kenneth W. Behrend

KWB/clh
Enclosure

"Exhibit 3 Omitted"

**BEHREND AND ERNSBERGER**
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AFFILIATED COUNSEL:
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WASHINGTON, D.C.
DANIEL W. CANNON

June 12, 1992

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Holidaysburg, PA 16648

Thomas Halloran, Esquire
Office of the Attorney General
Manor Building
564 Forbes Avenue
Pittsburgh, PA 15219

Re: *Sejpal et.al. v Corson et. al.*
Superior Court Docket No 581PGH1992

Dear Gentlemen:

Enclosed please find a Motion For Continuance Of The Appeal that has been filed with the Superior Court of Pennsylvania today.

Very truly yours,

/s/_____
Kenneth W. Behrend

KWB:lmz

Exhibit 4
Page 10

"Exhibit 5 Omitted"

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WASHINGTON, D.C.
DANIEL W. CANNON

July 17, 1992

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Thomas Halloran, Esquire
Office of the Attorney General
Manor Building
564 Forbes Avenue
Pittsburgh, PA 15219

Re: *Sejpal et.al. v Corson et. al.*
Superior Court Docket No 581PGH1992

Dear Gentlemen:

Enclosed please find a Brief and Reproduce Records that has been filed with the Superior Court of Pennsylvania today.

Very truly yours,

/s/_____
Kenneth W. Behrend

KWB:lmz
Enclosures

Exhibit 6
Page 12

## PROOF OF SERVICE

I, hereby certify that a true and correct copy of the foregoing has been mailed by First Class Mail, postage prepaid, pursuant to PA.R.A.P., Rule 121, this 17 day of July, 1992, addressed as follows:

David Donaldson, Esquire
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Manor Building
564 Forbes Avenue
Pittsburgh, PA 15219

/s/
Kenneth W. Behrend
Attorney for the Appellant

PROOF OF SERVICE

I, hereby certify that a true and correct copy of the foregoing has been mailed by First Class Mail, postage prepaid, pursuant to PA.R.A.P., Rule 521, this 9th day of February, 1993, addressed as follows:

David Donaldson, Esquire
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1515 Market Street
Philadelphia, PA 19102

Frank J. Stanek, Esquire
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Pittsburgh, PA 15219

/s/
Kenneth W. Behrend
Attorney for the Appellant

# MSAFP TELEPHONE REPORT

Patient Name: Julie Sejpal  Date of Specimen: 3/17/89
Referring Physician: DRM  Report Date: 3/24/94

20 Weeks Gestation  Based on __ Sonar √ LMP __ Exam

__ Singleton __ Twins  __ Insulin Dependent Diabetes Mellitus __ Race

17 IU/ml  0.52 MoM

1/210 Population Risk for Down Syndrome  1/94 Adjusted Risk for Down Syndrome

Recommendations:

1. ☐ Levels of MSAFP undetectable. Level II Ultrasound is recommended for correct gestational dating. If patient is < 14 weeks a repeat specimen should be drawn and sent between 16 to 18 weeks. If patient is > 14 weeks option of amniocentesis should be discussed. Genetic counseling is available to discuss modified risks and further testing.

2. ☐ Less than or equal to 14 weeks. Redraw at 16 - 18 weeks.

3. ☐ Sample hemolyzed. Repeat specimen needed.

4. √ Adjusted risk for Down Syndrome greater than 1/270. Patient should be informed of the availability of sonar and amniocentesis. Genetic counseling is available to discuss modified risk and options for further testing.

5. ☐ Value > 3 MoM. Increased risk for abdominal wall defect or open neural tube defect. Patient should be informed of the availability of sonar and amniocentesis.

Genetic counseling is available to discuss modified risk and options for further testing.

6. ☐ Elevated value less than 3 MoM. Level II Ultrasound for multiple pregnancy, obvious defects and gestational dating. if dating is consistent and < 19 weeks a repeat should be drawn and sent 8 to 10 days after initial specimen ( ). If dating is inconsistent or patient > 19 weeks please contact us for modified report. The availability of amniocentesis should be discussed with the patient. Genetic counseling is available to discuss risk and options for further testing.

7. ☐ Family history of CNS closure defect. Patient's risk based on history _____. Women should be informed that MSAFP only rules out 90% of the cases of SBC and 90% of the cases of anencephaly. Genetic counseling is available to discuss risk and options for further testing.

8. ☐ Twin pregnancy $\geq$ 2.5 MoM. Level II Ultrasound to rule out obvious defects.

IN THE COURT OF COMMON PLEAS OF CAMBRIA
COUNTY, PA
CIVIL DIVISION
* * * * * * * *

JULIE SEJPAL and VINOD SEJPAL *
and ERICA LYNN SEJPAL, a minor, *
by JULIE SEJPAL, her guardian, *
*
Plaintiffs *
*
vs. *
*
CORSON, MITCHELL, TOMHAVE & *
MCKINLEY, M.D.S., INC.; HAMPTON *
CORSON, DONALD MITCHELL, ROBERT *
TOMHAVE, RICHARD G. MCKINLEY, *
DONALD R. MCKINLEY and CONEMAUGH*
VALLEY MEMORIAL HOSPITAL, *
*
Defendants. *

* * * * * * * * *

DEPOSITION OF
JULIE SEJPAL

Taken on behalf of the Defendants herein, Conemaugh Valley Memorial Hospital, pursuant to the Rules of Civil Procedure, taken before me the undersigned, Christine M. Lesiure, a Court Reporter and Commissioner of Deeds in and for the Commonwealth of Pennsylvania, at the Borough Building Meeting Room, 300 West High Street, Ebensburg, Pennsylvania, on Tuesday, March 8, 1994, at 10:55 a.m.

SARA ANN SARGENT
COURT REPORTING SERVICE
210 MAIN STREET
JOHNSTON, PA 15901
(814) 536-8908

APPEARANCES

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P.O. Box 533
Hollidaysburg, PA 16648
Counsel for Conemaugh Valley Memorial Hospital

. . .

[33]
[Julie Sejpal] A. Yes.
[Attorney Hartye] Q. And he called the results in?
A. Right.
Q. To Magee?
A. I knew he called them to somebody. I didn't know who at the time.
Q. And then you went back into his office?
A. Yes.
Q. And he talked with you at that time?
A. Yes.
Q. Tell me what you recall about your conversation with Doctor Donald McKinley on this date?
A. He said that I just wasn't as far along as what they thought. Everything was fine and they changed the due date. I asked him if the test should be repeated and he said, no, there's no need. Everything is fine. I may have asked that twice.
Q. Did he show you any documents or test results relating to your blood test?
A. Not that I recall.
Q. Did he discuss with you probabilities of Down Syndrome or anything of that nature?
A. No.
Q. Did he discuss with you your age in
[34]
relationship to the risk of Down Syndrome?
A. No.
Q. Was it your understanding that the Doctor was telling you that the tests showed that everything was fine?
A. Yes.
Q. And that it was not necessary to have any additional tests?
A. That's what I assumed.
Q. Did you ask him specifically whether or not he recommended additional -- not to have that one test redone, but whether he recommended additional testing?
A. No, because I was told that that was the first step. If there were no concerns there, it was my understanding there was no need for any additional tests.

Q. And you're saying that you don't recall any discussion concerning an amniocentesis that day?
A. There was no discussion of an amnio.
Q. Subsequent to that particular visit where you had the ultrasound done and you had this conversation with Doctor Donald McKinley, did you have any further conversations with any of the physicians in the office concerning your age and the
**[35]**
risk of having a Down Syndrome baby?
A. No, not that I recall.
Q. Just so I have it right, you recall there was a specific conversation with Doctor Tomhave concerning this in January 20 of '89; correct?
A. Concerning what?
Q. Concerning Down Syndrome and tests that could be done in order to ---?
A. It wasn't specifically Down Syndrome, just tests in general for women over the age of 35.
Q. And in what terms did you talk about it, if not specifically Down Syndrome?
A. I don't remember. All I remember is that there were three tests that could detect problems in pregnancies of women over age 35. That's what he told me.
Q. When you went into the office back in January 20th of '89 you indicated that during this conversation you brought up about amniocentesis; correct?
A. Right.
Q. And when you brought it up, you brought it up for what reason?
A. Because I was over the age of 35.
Q. And?
**[36]**
A. I thought I was supposed to have an amniocentesis.
Q. For what reason?
A. Because I'm over the age of 35 and there's an increased risk of problems.
Q. Of just problems?
A. Problems in general.
Q. So there was no discussion about congenital defects, it was

more just talking in general about problems with pregnancies over 35 years of age?

A. I can't recall the specific conversation but I know that there are increased risks to the mother as well as the baby over age 35.

Q. So you were not talking specific defects on that day, you were just talking problems?

A. Maybe he reeled off all of them, I don't know. I just know that there are more problems over that age. I thought an ultrasound was routine in women over 35 -- I mean an amniocentesis was routine.

Q. Do you recall any specific conversation with either of the two doctors, Doctor Tomhave or Doctor Donald McKinley, on the two days we've talked about where Down Syndrome was even mentioned?

A. Like I said, that first visit with Doctor

**[37]**

Tomhave, he may have went over all the different problems that could occur. You know, he might have mentioned it, but nobody ever specifically talked to me about Down Syndrome.

Q. And you can't remember for sure whether that's one of the things he mentioned?

A. I know with Donald McKinley at the ultrasound, no mention was ever made.

Q. But with Doctor Tomhave you're saying you can't recall one way or the other?

A. He may have gone over in general problems associated with an older mother but there was no specific talk about Down Syndrome, nothing that stands out in my mind.

Q. And you didn't bring it up?

A. I brought up amniocentesis.

Q. But you didn't bring up Down Syndrome?

A. No.

Q. I know we've covered it but let's go back for a moment. I asked you what your intentions were before as to if the baby was Down Syndrome on that day and you indicated that you would have --

A. Aborted.

Q. -- aborted. Maybe that wasn't a fair question. Were you thinking in terms of Down

. . .

**[51]**

[Julie Sejpal] A. I'm not sure exactly.

[Attorney Hartye] Q. Do you know how many scars you have now?

A. Not really.

Q. Are you saying as part of this lawsuit that you would not have consented to the tubal ligation had you known that the child was Downs?

A. Yes.

Q. And when did you come to that determination?

A. I don't know the exact moment but I know that if I had known she was Downs I would have aborted.

Q. I guess my question is this, are you saying that had the doctors told you in the Operating Room after the delivery of the baby the baby is Downs, do you want to go through with the tubal or not, are you saying that you would have told them, no, I don't want the tubal?

A. Right, I would have told them no.

Q. Why would you have told them no?

A. Because I would have a chance to have another pregnancy, a normal pregnancy.

Q. You would have your daughter and you would still think about having another child; is that what you're saying?

. . .

**[118]**

Syndrome?

[Julie Sejpal] A. No, I did not. I just asked him, should he repeat the test. And he asked me what test, and I said the alphafetal protein test. He looked over my records and he said, there's no need, everything is fine. You weren't as far along as what we thought. And then as he was leaving the room he said something about it being too late anyway.

[Attorney Behrend] Q. Did you ask him about that?

A. No, I did not.

Q. Were you able to ask him?

A. I suppose I could have stopped him and asked him. I just sat there thinking what does he mean it's too late.
Q. He was leaving the office?
A. He was walking out the door as he said it.
Q. Now, this R. McKinley, that's not D. McKinley?
A. No, that's Richard McKinley.
Q. Are they related?
A. I think they're brothers.
Q. And then again on August 8 you had another meeting with Doctor R. McKinley.
A. Right.
Q. And was that the time that you and he

. . .

**[120]**
[Attorney Behrend] Q. And then you had another discussion with Doctor R. McKinley on August 30th, 1989; did you not?
[Julie Sejpal] A. Yes.
Q. And was he the Doctor that did the tubal ligation?
A. Yes.
Q. Now, during the procedure -- how did that go first? Did they do the C-section and deliver the child?
A. Yes.
Q. And then they continued immediately into the tubal ligation or were you moved somewhere else? Explain to us.
A. Well, after the baby was born, they showed her to me and then --.
Q. Who is they?
A. The nurse. She was all wrapped up. And then, I don't know exactly what he has to do after the actual C-section but I assumed he was getting ready to do the tubal. And everybody seemed to be rushing around and he asked the nurse, is she okay. And the nurse --.
Q. Referring to what?
A. The baby, is the baby okay. And she said yeah, she's fine. She needs a little oxygen. And I

**[121]**

believe my husband left then after the baby was okay, supposedly okay. And then he asked again, is the baby okay, is she all right. And the nurse told him again, yeah, she's fine.

Q. And then he did the tubal ligation?

A. Yes.

Q. Was that done in the same room?

A. Yes, right in the same --.

Q. Were you still on the same table?

A. Yes, same table.

Q. And then the same R. McKinley when you thought you had infections, he came in to --?

A. I thought the sutures were infected.

ATTORNEY HARTYE:

I'm going to object. He didn't even ask a question and she's answering.

BY ATTORNEY BEHREND:

Q. With respect to Doctor R. McKinley after delivery, you had a conversation with him about whether your sutures were infected?

A. Yes, that's true.

Q. How did he come to have that conversation with you?

A. I had been home about two weeks and thought my sutures were infected. So I called and made an

. . .

Supreme Court, U.S.
FILED
JUN 13 1994
OFFICE OF THE CLERK

No. 93-1820

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JULIE SEJPAL, VINOD SEJPAL and ERICA LYNN SEJPAL, a minor, by Julie Sejpal, her guardian,

*Petitioners,*

*v.*

CORSON, MITCHELL, TOMHAVE & McKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY and CONEMAUGH VALLEY MEMORIAL HOSPITAL,

*Respondents.*

## BRIEF IN OPPOSITION FOR RESPONDENTS CORSON, MITCHELL, TOMHAVE, & McKINLEY, M.D.S, INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY and DONALD R. McKINLEY

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WHETHER PENNSYLVANIA'S STATUTORY PRECLUSION OF CIVIL TORT ACTIONS FOR "WRONGFUL BIRTH" FOUND AT 42 Pa.C.S. §8305(a) IS CONSTITUTIONAL RELATIVE TO THE ISSUES OF STATE ACTION, COMPELLING STATE INTEREST, DUE PROCESS AND EQUAL PROTECTION TO WOMEN?

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

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JULIE SEJPAL, VINOD SEJPAL and ERICA LYNN SEJPAL, a minor, by Julie Sejpal, her guardian,

*Petitioners,*

*v.*

CORSON, MITCHELL, TOMHAVE & McKINLEY, M.D.S., INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY, DONALD R. McKINLEY and CONEMAUGH VALLEY MEMORIAL HOSPITAL,

*Respondents.*

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## BRIEF IN OPPOSITION FOR RESPONDENTS CORSON, MITCHELL, TOMHAVE, & McKINLEY, M.D.S, INC., HAMPTON CORSON, DONALD MITCHELL, ROBERT TOMHAVE, RICHARD G. McKINLEY and DONALD R. McKINLEY

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## COUNTER-STATEMENT OF THE CASE

The instant matter arises from an action instituted by Plaintiffs in the Court of Common Pleas of Cambria County, Pennsylvania, wherein Plaintiffs asserted, inter alia, causes of action for "wrongful birth" and "wrongful

life" in connection with the birth of their daughter, Erica Lynn Sejpal. Central to Plaintiffs' claims are allegations that the Defendant medical providers did not perform medically warranted diagnostic, pre-natal exams upon the Plaintiff-mother and her fetus, nor did they provide proper genetic counselling during the course of the pregnancy, thus failing to alert Plaintiffs to the fact that their daughter would be born with Down syndrome. As a result of said circumstances, Plaintiffs have instituted suit to recover for alleged injuries occasioned by the birth of their daughter under such conditions.

In response to Plaintiffs' civil complaint, the Defendants filed preliminary objections inthe nature of a demurrer and/or motion to strike those counts which purported to set forth causes of action for wrongful birth and wrongful life. Plaintiffs countered by arguing that the statutory preclusion of similar suits as found at Title 42 Pa.C.S. §8305 was unconstitutional. Relying upon the statutes and the fundamental scope of review normally accorded properly enacted legislation, the Court dismissed those causes of action which were at issue in the preliminary objections. Moreover, the Court indicated that the statutory preclusion of wrongful birth and wrongful life tort actions was not contrary to the provisions of the United States Constitution, contrary to Plaintiffs' arguments.

The Sejpals appealed the decision of the trial court to the Pennsylvania Superior Court. The parties briefed and argued the issues brought on appeal, said issues for purposes of the attendant Petition for Writ of Certiorari limited to the constitutionality of Pennsylvania's statutory preclusion of wrongful birth and wrongful life causes of action. The appellate court ultimately ruled that Plaintiffs failed to properly preserve the aforesaid

issue for consideration, insofar as they neglected to provide proper notification to the Attorney General of Pennsylvania as required by Pa.R.A.P. 521(a). When the Commonwealth is not a party to an action wherein a statute is challenged upon constitutional grounds, the party raising the issue must notify the Attorney General's office in order to allow for his/her participation in the defense of the statute.

The decision effectively kept intact the trial court's disposition of the preliminary objections filed to Plaintiffs' causes of action for wrongful birth and wrongful life. The appellate court did not address the merits of Plaintiffs' constitutional challenges to the statutory preclusion as a result of the procedural error. The Superior Court also denied Plaintiffs' request for reargument, following of which Plaintiffs filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania. This, too, was denied.

## REASONS FOR DENYING THE WRIT

Petitioner assert that 28 U.S.C. §1257(a) forms the basis for jurisdiction of this Court over the issues in this matter. The Supreme Court will exercise its discretionary jurisdiction under this provision when a final judgment is rendered by the highest court of the state in which a decision could be had. However, the within Petition does not present such a matter. Rather, the issue for which Petitioners seek review was not properly preserved for consideration by the state courts, precluding a decision on the merits. Hence, a final judgment has not been rendered, thereby precluding jurisdiction of this Court over the issues presented by Petitioners.

Moreover, even assuming, arguendo, that this Court has jurisdiction over the issues presented, the decision of the trial court upholding Respondents' demurrer and finding constitutional the statutory preclusion of wrongful birth and wrongful life causes of action is correct and consistent with the applicable decisions of this Court and other courts focusing upon same. The arguments and grounds asserted by Petitioners for the exercise of this Court's discretionary jurisdiction are wholly without foundation or merit.

## I.

## THIS COURT DOES NOT POSSESS JURISDICTION OVER THE WITHIN ISSUES BECAUSE PENNSYLVANIA'S STATE APPELLATE COURTS DID NOT ENTERTAIN THE CONSTITUTIONAL CHALLENGE TO Pa.C.S. §8305-(a) ON ITS MERITS AS A RESULT OF PETITIONERS' FAILURE TO PROPERLY PRESERVE THE SAME FOR CONSIDERATION.

Petitioners clearly indicate in their Petition for Writ of Certiorari that jurisdiction is premised upon 28 U.S.C. §1257(a). The Supreme Court of the United States may exercise its discretionary jurisdiction over matters that are fina judgments rendered by the highest court of a State in which a decision could be had, as in such instances when the validity of a statute of any State is brought into question as repugnant to the Constitution. It is essential, therefore, that there be explicit and timely insistence in state courts that a state statute, as applied, is contrary to the dictates of the federal constitution, treaties or laws. *Rohr Aircraft Corp. v. County of San Diego,* 80 S.Ct. 1050 (1960).

In the present matter, Petitioners for the first time at the trial court level raised a constitutional challenge to

Pennsylvania's statutory preclusion of wrongful birth and wrongful life causes of action, the same of which is found at 42 Pa.C.S. §8305(a), in response to preliminary objections in the nature of a demurrer filed by Respondents to the initial complaint and said causes of action set forth therein. Prior to that time, no mention was made of a constitutional challenge to the aforesaid statutory provisions, nor was the Attorney General of Pennsylvania notified of such a challenge. The original posture of this matter was a civil tort action sounding in negligence as a medical malpractice action, the Defendants being those who may have provided care or facilities for Petitioner-Wife during her pregnancy with Erica Lynn. Petitioners did not initially raise the constitutional challenge to 42 Pa.C.S. §8305(a) through a complaint, nor was the State made a party to the within action.

Subsequent to the trial court's disposition of various preliminary objections, including the demurrer to each wrongful birth cause of action, Petitioner took an appeal to the Superior Court of Pennsylvania. There they asserted that the statutory preclusion of a civil tort action for wrongful birth was repugnant to the federal constitution and the guarantees afforded women by the Due Process Clause of the Fourteenth Amendment, insofar as the statute has a chilling effect upon a woman's right to choose an abortion. This issue, among others, was briefed and argued before a panel of the Superior Court.

Although mentioning that Petitioners' cause of action would be barred by operation of 42 Pa.C.S. §8305(a), the appellate court did not reach a final determination on the merits in this respect. Rather, the Superior Court reviewed the record and determined that the issue was not properly preserved under applicable rules of appellate

procedure so as to be before it for consideration. The Superior Court noted that the record did not reflect that the Attorney General of Pennsylvania received proper notification of a constitutional challenge to the aforesaid statute which is required by Pennsylvania Rule of Appellate Procedure No. 521(a).

As provided by Pa.R.A.P. 521(a), when the Commonwealth is not a party to an action wherein a state statute is challenged upon constitutional grounds, immediate notification in writing to the Attorney General of Pennsylvania of the existence of the question is required. A copy of the pleadings and other relevant portions of the underlying record must accompany said written notification. See, Pa.R.A.P. 521(a). The Superior Court having before it the entire certified record, however, indicated that Petitioners failed to satisfy adequately this procedural requirement, thus neglecting to preserve the constitutional challenge for appeal. See also, *Butler v. Rolling Hill Hospital,* 382 Pa.Super. 330, 555 A.2d 205 (1989).

A careful reading of the appellate court's opinion relative to the constitutional challenge to 42 Pa.C.S. §8305(a) was set forth in a conditional sense. The Superior Court did not issue an opinion that was determinative of the merits of Petitioners' constitutional challenge, as the same was not properly preserved for judicial review. As a result of Petitioners' failure to adhere to Pa.R.A.P. 521(a), the validity of Pennsylvania's statutory preclusion of a wrongful birth cause of action was not before the Superior Court for disposition. The appellate court did not address the merits, but simply considered the issue waived by Petitioners' failure as aforesaid. Since Petioners neglected to properly

preserve the issue for consideration, it too fails to be before this Court for consideration on the merits.

After the Superior Court denied Petitioners' request for reconsideration, a Petition for Allowance of Appeal was filed with the Supreme Court of Pennsylvania, the State's highest court. By letter, the court indicated a per curiam decision to deny the Petition for Allowance of Appeal, thus effectively preserving the decision of the trial court disposing of the wrongful birth cause of action by operation of 42 Pa.C.S. §8305(a). This denial of further appellate review also preserved the lower appellate court's finding that Petitioners waived consideration of the constitutional challenge to 42 Pa.C.S. §8305(a) for failing to provide proper notification to the Attorney General of Pennsylvania of the constitutional challenge to a State statute.

In this context, Respondents submit that jurisdiction with the Supreme Court is now wanting. A constitutional challenge to Pennsylvania's statutory preclusion of wrongful birth causes of action was not properly preserved for appellate review during the course of the state court proceedings. Since a final decision on the merits was not rendered by the highest court of the State in which a decision could be had, this Court does not possess jurisdiction under the provisions of 28 U.S.C. §1257(a). See also, Supreme Court, Rule 10.1(c). Accordingly, this Court would act properly and in accordance with long-standing principles guiding the exercise of its discretionary jurisdiction by denying Petitioners' request for a Writ of Certiorari.

## II.

### A. PENNSYLVANIA'S STATUTORY PRECLUSION OF WRONGFUL BIRTH CAUSES OF ACTION, AS FOUND AT 42 Pa.C.S. §8305(a), DOES NOT IMPLICATE STATE ACTION IN THE DEPRIVATION OF A WOMAN'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the event that the Court determines that the within matter presents itself in a posture which makes available the exercise of its discretionary jurisdiction, a Writ of Certiorari should be denied because the trial court ultimately ruled correctly that Pennsylvania's statutory preclusion of wrongful birth causes of action is not repugnant to the federal constitution, nor is it contrary to the dictates of *Roe v. Wade,* 93 S.Ct. 705 (1973), and its progeny. In order to be a violation of these protected interests, a state must directly affect or impose a significant burden on a woman's right to choose an abortion. *Maher v. Roe,* 97 S.Ct. 2376 (1977).

Petitioners herein allege that 42 Pa.C.S. §8305(a), which precludes civil causes of action of wrongful birth, unconstitutionally interferes with her right to exercise reproductive freedom. In particular, Petitioners argue that insulating medical providers from civil liability for failing to properly inform their pregnant patients of fetal abnormalities encourages such behavior, thus creating a substantial obstacle to women who would choose to abort a fetus rather than carry it to term. Petitioners Sejpal. thus, argue that Pa.C.S. §8305(a) infringes upon the wife's right to choose abortive procedures under *Roe v. Wade,* and therefore violates her due process and equal protection rights under the Fourteenth Amendment.

To assert successfully a claim that a statute violates one's due process or equal protection rights under the federal constitutionl a party must demonstrate that state action is involved. *Shelly v. Kraemer,* 68 S.Ct. 836 (1948). Legislation which does not place an obstacle attributable to the government in the path of a woman's full reproductive freedom will not be deemed unconstitutional by the Court under its due process and equal protection analysis. *Harris v. McRae,* 100 S.Ct. 2671 (1980). The state retains the authority to enact legislation that attempts to effectuate valid interests it holds, while the same may have incidental effects that do not create an undue burden in the exercise of said reproductive freedom.

In the present matter, the allegations of negligence focus upon the medical providers' failure to perform certain diagnostic, pre-natal exams, as well as their failure to communicate information contained in other test results, thus preventing the mother from knowing that her fetus suffered from genetic abnormalities. The dearth of information allegedly prevented the mother from exercising her reproductive freedom with full information and knowledge of the circumstances attending her pregnancy. By precluding Petitioners from seeking relief through a civil tort action for wrongful birth, Petitioners argue that the State effectively encourages such behavior by insulating the medical providers from liability, and thus places a substantial obstacle in her path to choose an abortion.

However, the statutory preclusion of wrongful birth actions does not involve state action creating an obstacle to a woman's reproductive freedom. Rather, any infringement on this protected interest arises from the medical providers and not as a result of state action. As this

Court has recognized: "[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Harris*, 100 S.Ct. at 2688.

Moreover, the rights enunciated in *Roe v. Wade* and its progeny have been consistently interpreted in a manner recognizing that they are not universal and unqualified. *Planned Parenthood v. Casey*, 114 S.Ct. 909 (1994). State regulations that may have an incidental effect on a woman's ability to seek an abortion are not, *ipso facto*, an infringement of that right. *Id.* A statute is only improper when it creates a substantial obstacle or burden for a woman seeking an abortion; however, a state has no obligation to remove an existing obstacle that is not of its own making. *Harris, supra.* See also, *Webster v. Reproductive Health Service*, 109 S.Ct. 3040 (1989).

Although the Superior Court of Pennsylvania did not address the merits of a constitutional challenge to Pa.C.S. §8305(a) in this particular action, it has previously determined that it would be pure speculation to assume that extinguishing a civil cause of action for wrongful birth actively encourages improper behavior. *Edmonds v. Western Pennsylvania Hospital Radiology Associates*, 414 Pa.Super. 567, 607 A.2d 1083 (1992). The statutory preclusion of said cause of action also provides that medical providers will continue to be subject to licensing and disciplinary boards for making intentional misrepresentations in connection with patient care. *Id.*

The Osteopathic Medical Practice Act, 63 P.S. §271.1 *et seq.*, and the Medical Practice Act of 1985, 63 P.S. §422.1 *et seq.*, respectively create the State Board of Osteopathic Medicine and the State Board of Medicine. These regulatory boards establish licensing procedures

for various medical providers, including physicians, and also provide that licenses can be suspended, refused or revoked for certain enumerated reasons. *Edmonds,* 607 A.2d at 1087.

Since 42 Pa.C.S. §8305(a) expressly states that it does not extend immunity or constitutes a defense to disciplinary proceedings pursuant to the aforementioned Acts, it does not encourage physicians to make misrepresentations. *Id.* Nor can it be presumed that the statutory preclusion of wrongful birth actions encourages negligent behavior. All doubts as to the constitutional integrity of a statute must be resolved in favor of the statute. *Dranzo v. Winterhalter,* 395 Pa.Super. 578, 577 A.2d 1349 (1990). The potential for professional sanctions in connection with allegations similar to those Petitioners now assert effectively takes an obstacle that may exist outside the scope of state action; hence, Petitioners' claims to violations to wife's due process and equal protection rights must fail.

In conclusion, the statutory preclusion of wrongful birth causes of action does not interfere with a woman's right to have an abortion. A woman continues to be free from obstacles when such a determination is made. The preclusion does not impose a restriction upon, or authorize action impeding a woman's right to an abortion, nor does it impose procedures which unduly burden the exercise of that right. Instead, the State legislature has simply extinguished a civil cause of action for money damages in a claim that but for the improper conduct of a medical provider, a child would have been aborted prior to birth. This simply fails to constitute a state-created obstacle to a woman's exercise of her reproductive freedom.

## II.

### B. PENNSYLVANIA'S STATUTORY PRECLUSION OF WRONGFUL BIRTH CAUSES OF ACTION, FOUND AT 42 Pa.C.S. §8305(a), PROMOTES A LEGITIMATE STATE INTEREST WHICH IS RATIONALLY FURTHERED BY THE AFORESAID LEGISLATIVE ENACTMENT.

Petitioners also argue that Pennsylvania's Wrongful Birth Statute is overly broad and fails to serve a compelling state interest. This position indirectly evokes the argument that Petitioner-wife's right to due process and equal protection under the Fourteenth Amendment is violated by 42 Pa.C.S. §8305(a). In connection therewith, Petitioners assert that the fundamental rights allegedly affected by the statutory preclusion must be subject to the highest level of scrutiny, justified only by compelling state interests which the statute is narrowly drawn to accomplish.

As aforesaid, however, the statutory preclusion of such causes of action does not amount to state action that interferes with a woman's reproductive choices. This situation is entirely different from that previously considered by the Court, as in the case of *Planned Parenthood of Central Missouri v. Danforth,* 96 S.Ct. 2831 (1976), wherein this Court held that a statute requiring spousal consent to an abortion was unconstitutional. In such an instance, the State created an obstacle whereby a husband could unilaterally prevent a woman from exercising her reproductive freedom for whatever reason, notwithstanding her desire to undergo such a procedure.

In contrast, Pennsylvania's Wrongful Birth statute does not directly create an obstacle in a woman's exercise of her reproductive freedoms. Denying Petitioners the right to bring a civil cause of action for the alleged wrongful birth of their daughter does not amount to an impair-

ment of the wife's right to secure an abortion, notwithstanding any negligence on the part of a physician who fails to inform her of the death of the fetus. See, *Dansby v. Thomas Jefferson University Hospital,* 623 A.2d 816 (Pa.Super. 1993).

Furthermore, to violate a woman's right to equal protection, a statute must discriminate against women who comprise a suspect class. Women who choose abortion, however, are not generally considered members of a suspect class. *San Antonio School District v. Rodriguez,* 411 U.S. 1 (1973). This Court in *San Antonio* held that a suspect class is one:

> [S]addled with such disabilities, or subjected to such history of purposeful and unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

*Rodriguez,* 411 U.S. at 28. See also, *Maher v. Roe,* 97 S.Ct. 2376 (1977).

Since the 42 Pa.C.S. §8305(a) does not infringe on a fundamental right or suspect class through state action, the state is not required to justify the statute as furthering a compelling interest. It is only necessary that the state assert a rational basis for the statute in order for it to comport with the Equal Protection Clause of the Fourteenth Amendment. *Rodriguez, ibid.*

Although Petitioners focus upon segments of the debate surrounding Pennsylvania's Wrongful Birth Statute, it is clear under this "rational basis" analysis that the statute represents attempts to resolve concerns in a constitutional manner. The legislature desired to eliminate lawsuits to recover damages merely for the birth of a child, whether handicapped or otherwise. This

state accepted the policy that it should promote life, rather than creating an environment that promotes eugenic abortion. See, 1988 Pa. Legis. Serv. 1961 (Purdons).

The legislature also provided several persuasive reasons to support the policy furthered by 42 Pa.C.S. §8305(a). First, birth in any sense should not be considered an evil that is to be avoided. Second, these lawsuits, together with wrongful life actions, are both illogical and inconsistent. Sanctioning actions against life simply because an individual is handicapped creates a situation where those who are alive, but handicapped, are less than "normal" individuals who may be compensated for their very being.

Third, legislators should not dictate to a medical provider how to conduct his/her practice. Civil actions for wrongful birth would coerce physicians to act against their will or conscience by practicing and/or encouraging abortions. Although they are subject to professional standards by the various Acts regulating the practice of medicine, generally, the legislature should not dictate every circumstance as it regards abortions. Finally, the need to control ever increasing medical malpractice insurance warrants weighs in favor of eliminating this type of civil action. See, 1988 Pa. Legis. Serv. 2306 (Purdons).

Pennsylvania's statutory preclusion of wrongful birth actions is rationally related to the legitimate state interest in recognizing the value of human life. Said statute does not infringe upon a woman's due process or equal protection rights under the federal constitution, as well as the reproductive freedom recognized by *Roe v. Wade* and its progeny, and thus survives Petitioners' constitutional challenge. Hence, the Petition for Writ of Certiorari should be denied.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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